









The  
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PROFESSOR T. P. TASWELL-LANGMEAD, B.C.L., OXON., AND  
MR. C. H. E. CARMICHAEL, M.A., OXON., FROM 1875 TO 1883,

AND BY THE LATTER GENTLEMAN (ASSISTED BY  
MR. W. P. EVERSLEY, B.C.L., M.A., OXON.), TO 1895.

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Continued by

SIR G. SHERSTON BAKER, BART.,

*Of Lincoln's Inn, and of the Western Circuit, Barrister-at-Law; Associate of  
the Institut de Droit International; Recorder of Barnstaple and Bideford.*

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February, 1896.

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The great success which the late Professor Taswell-Langmead's book has met with, not only in the United Kingdom, but also in the principal British Colonies and in the United States, has led to an early demand for a Fourth Edition. The work has again been entrusted to the Editor of the third Edition, Mr. C. H. E. Carmichael, M.A., who, while taking care, as one of the Author's oldest and most intimate friends, to preserve in every important respect the harmony of the work as a whole with previous Editions, has added much new matter alike in the way of Notes and Appendices, and of references to authorities. The publications of the Camden Society, the English Historical Society, the Royal Archaeological Institute, the Royal Society of Antiquaries of Ireland, the Royal Society of Literature, the Selden Society, and other kindred bodies, have been referred to for verification or fresh illustrations. The often conflicting views of modern writers on many points connected with Medieval Law and Custom, have been, as far as possible, presented to the reader, together with such statement of the Editor's own views as seemed necessary to the clearness and consistency of the new Edition. In this respect much valuable aid has been rendered by papers in the *Archæological Review* and the *English Historical Review*, and in Vol. I. of *Domesday Studies*, from which the Editor has gathered some of the latest expressions of opinion on the part of contemporary English and Foreign writers on subjects connected with English Constitutional History. The *Exchequer Rolls of Scotland*, edited by the late Lyon King of Arms, and the works of W. F. Skene, LL.D., the late Cosmo Innes, and the late Earl of Crawford and Balcarres, have been consulted for many details of Medieval Scottish Law, while the *Journal* of the Royal Society of Antiquaries has yielded some interesting matter throwing light on Medieval Land tenures in Ireland. It is hoped that the Fourth Edition of Taswell-Langmead's *English Constitutional History* will be found as useful and as generally accurate as the two Editions which the Author himself saw through the Press, and the sheets of which were in each case revised by this Editor.

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# THE LAW MAGAZINE AND REVIEW.

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No. CCXCIX.—FEBRUARY, 1896.

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## Obiter Dicta.

THERE are only 81 Appeals for the Lord Justices these Sittings.

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The new Public Record Office in Chancery Lane is now open for public business. It is a magnificent building, and well adapted to contain the invaluable records of the past, and of the time to come. The site on which it stands was, in the reign of Henry III., occupied by a house for the reception of convert Jews. Edward III. annexed this house to the Office of the Master of the Rolls, and it was afterwards known as The Rolls House.

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The new Summary Jurisdiction (Married Women Act, 1895) came into force on the 1st of January. It enables any married woman, whose husband shall have been convicted summarily of an aggravated assault upon her or convicted upon indictment of an assault upon her and sentenced to a fine exceeding £5 or imprisonment exceeding two months, or whose husband shall have deserted her, or been guilty of persistent cruelty to her, or of wilful neglect to provide reasonable maintenance for her or her infant children, and shall by such cruelty or neglect have caused her to leave him, to apply to a Court of Summary Jurisdiction for an order under this Act.



This Court may order (a) that the applicant be no longer bound to cohabit with her husband ; (b) that the custody of children under 16 years be committed to the applicant ; (c) that the husband pay to the applicant a weekly sum not exceeding £2 ; (d) payment by the applicant or the husband or both of them of costs. An appeal lies to the Divorce Court.

---

It is time that such an Act was passed. It is grievous to think that it should be necessary in this epoch of boasted civilization. Its practical effects will probably be to diminish the number of actions for divorce, which will be a distinct gain to morality.

---

The Court of Appeal of Paris (28th November, 1895) declares that the Eastern Railway Company may not convert its 5 per cent. bonds ; because there is a provision therein for a scheme for paying off at par these bonds in a certain manner. We may advantageously contrast this equitable decision with the policy of the Russian Government, which we are informed intends to reduce the interest on their bonds of 1867, 1869, and 1880, which were issued under similar conditions.

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The *Chicago Legal News* (November 4th, 1895) relates a curious incident. In the Superior Court of Anderson, Ind., on the above date, one W. H. Freeman appeared in the interest of a client. William S. Devin was the Judge. He is a mason and prominent in other secret orders. The masonic pin was worn. Freeman took a seat directly in front of the Judge. As the case proceeded he gave the masonic sign of distress. It was quickly recognized by the Judge and masons on the jury. The Judge told Freeman not to interfere with the proceedings, and as soon

as an officer came in, sent Freeman to gaol on the charge of contempt of Court. Freeman belongs to the masonic lodge at Centerville. He telegraphed to masons at Kokomo for assistance. He denies that he made any masonic sign, but the Judge declares he did it boldly and for effect on the case. Freeman says he will appeal to the Grand Lodge for vindication.

---

The above periodical remarks on this incident :—"It was clearly the duty of Judge Devin, when Freeman sought to influence the Court and jury by giving the masonic sign of distress, to punish him for so doing. In fact every mason who stands true to the principles of the order will say, *served him right*. Such conduct is not justified even by masons. Judge Seymour D. Thompson, who was one of our best and purest American Judges, although not a mason, says when Judge of the St. Louis Court of Appeals he was, while on the bench, frequently approached by persons giving masonic signs. We are satisfied if Judge Thompson had been a mason and fully understood what these men, who disgraced the masonic order, were trying to do, he would have inflicted greater punishment upon them than Judge Devin did on Freeman."

---

The Hon. James B. Bradwell, in his *Ancient Masonic Rolls*, says :—"We have met masons of the ignorant sort, who have told us that any mason who was a Judge would favour a mason who was a suitor, 'other things being equal,' or there being latitude for decision, or room for doubt—over a suitor who was not a mason. While sitting on the bench, we have also had signs made to us by members of the Bar, of such a uniform character that we were led to believe that they were the signs of some secret order. Our belief is that persons who make such statements, and

especially that a lawyer who will make a sign of any secret order, to which he may belong, to a Judge on the bench, dishonours the principles of that order. On the other hand, we have met masons of high standing who have not hesitated to express the opinion that while, in earlier, ruder, and more turbulent times, there was justification, or at least excuse, for good men binding themselves together in secret orders, with secret oaths, and with secret signs and passwords, by which they might know each other, so as to be able to assist and defend each other—yet that secret societies of every kind are out of place in a Republic like ours, and in the stage of civilization presented by our race in the nineteenth century.”

The above gentleman is answerable for the statement that there are in Mexico a number of masonic lodges composed of women. One of these, named Logia de Maria de Alarcon, pursues for its ideal the good of humanity, and during the year supplied clothing and food to more than 200 poor children. Another masonic lodge of women, named Melpomene, is commended for working without rest to supply food to the hungry. Five other lodges of women are mentioned, whose work is said to attest a “noble ambition of the heart of the Mexican women, that knows how to share its joys with the sufferers of misfortune.”

Mr. Andre Matteson, editor of the *Legal Adviser*, who is a good Spanish scholar, extracts the following from the report of the secretary of the Grand Lodge of Mexico, which was published in Spanish, relating to the connection of women with masonry:—“Informe del Gr. Sec. de la Gr. Logia de Este, ‘Valle de Mexico,’ No. 1, de los Trabajos verificados por la Alta Camara en 1892. Mexico, Edgar Bouligny, impresor, Calle de los Rebeldes.” Truly this adds one more danger to the snares of petticoated lawyers.

Fifty-one students were called to the Bar at the various Inns of Court on the 27th January last, as against 84 in the corresponding quarter last year. This shews a diminution of 33. We are not surprised at it; the prospects of the Junior Bar are at present miserable, and it is surprising that so many new names are entered, as students, to increase an already overcrowded profession.

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## I.—THE INSTITUTE OF INTERNATIONAL LAW.

THE sixteenth Session of the Institute of International Law was opened at Cambridge on the 8th August, 1895, and lasted until the 14th of that month. Trinity Hall kindly gave the use of its dining hall for the meetings, and Trinity College lodged most of the members. At the first meeting Mr. Westlake, LL.D., Q.C., the Whewell Professor of International Law, was elected President, and Vice-Presidents, Honorary Members, and new Associates were elected.\* The Vice-Chancellor of the University (Rev. Augustus Austen Leigh, M.A.) met the members of the Institute at the Senate House in the afternoon, and welcomed them in the name of the University. Professor Clark, LL.D., Regius Professor of Civil Law, representing the Faculty of Law in the University, seconded the welcome, to which Dr. Westlake, as President of the Institute, returned thanks on behalf of that Society. The

\* The Vice-Presidents were: F. Perels, Director at the Imperial Ministry of Marine at Berlin, and Ed. Clunet, Advocate at Paris; Carlos Calvo, L. Goldschmidt and K. d'Olivecrona were elected Honorary Members; as also the Baron A. de Courcel, French Ambassador at the Court of St. James. The following were elected Associates: Ch. Boiceau, of Lausanne; A. S. de Bustamente, of Havana; V. Daguin, of Paris; A. Darras, of Paris; J. A. Foote, of London; H. Goudy, of Oxford; I. Ivanovsky, of Odessa; M. Kebedgy, of Constantinople; Rouard de Card, of Toulouse.

Public Orator (Dr. Sandys) then presented first Dr. Karl Ludwig De Bar, and afterwards Professor F. De Martens, for the Honorary Degree of Doctor of Laws; Professor L. Renault, of Paris, and Professor T. M. C. Asser, of Amsterdam, would have received the same honour had they been able to attend.

The speeches of the Public Orator were as follows. First he welcomes Dr. De Bar:—

GERMANORUM e patria, Martis et Minervae sede florentissima, omine laeto allatum salvere hodie iubemus virum eruditissimum, qui regis nostri Wilhelmi quarti tempore extremo Hanoveriae natus, et tribus deinceps in Universitatibus professor nominatus, non modo patriae suae consiliarius sed etiam imperii totius, senator constitutus est. Quid dicam de laboribus eius infinitis plurimos per annos iuris gentium privati in provincia exploranda fortiter toleratis? Quid de opere eius maximo tres et triginta abhinc annos in lucem edito, et denuo, quod ad dimidiam eius partem attinet, operis pristini totius ad amplitudinem exaucto? Operis tam ingentis in ipso limine oratoris Romani verba inscripta libenter recordamur:—"qui civium rationem dicunt habendam, externorum negant, ei dirimunt communem generis humani societatem." Etiam professoris ipsius verba hodie mutuati non minus libenter confitemur, iuris gentium privati studium fila tenuissima illa quidem sed ad rerum magnam molem sustinendam apta contexere, quorum auxilio et mercis et mentis commoda inter populos permutantur, gentes inter se diversae reverentia mutua invicem consociantur, pacis denique imperium per orbem terrarum ubique confirmatur. Confitemur etiam populi fortis et prosperi esse, nulla amoris proprii sollicitudine excitata, sed patriae amore incolumi conservato, advenas non iam hostium sed hospitum in loco habere, et orbis terrarum gentes vinculis artioribus inter sese coniungere.\* Eo libentius igitur hospitem nostrum honoris causa salutamus, Iuris Gentium Instituti quondam praesidem, professorem illustrem Goettingensem, CAROLUM LUDOVICUM DE BAR.

Then he speaks of Professor De Martens:—

RUSSORUM ex imperio amplissimo legatum ad nos missum quam libenter excipimus, quam libenter laudamus. Quotiens, patriae in nomine, exteras inter gentes, consiliis quantis quam prudenter interfuit. In urbe quod Belgarum caput est, olim de iure belli, nuper de Afrorum libertate, viris summis deliberantibus, quanta cum dignitate imperii maximi quasi personam gessit. Ideni, ne minora commemorem, quanta industria, quanto ingenio, foedera omnia Russorum ab imperio cum Europae gentibus icta, quot voluminum in

\* Von Bar, *Theory and Practice of Private International Law*, ed. 2 (pp. 1, 162), p. xi. ed. Gillespie, 1892.

serie collegit, collecta ordinavit, ordinata historiae luce illustravit. Quanta cum voluptate volumina Britannorum foederibus reservata, haud ita pridem incohata, ad finem felicem perducta videbimus.\* Interim, aureo libello sedecim abhinc annos in lucem misso, orientis rebus quantum lumen attulerit animo grato recordamur.† Optamus denique ut, salvo Russorum, salvo etiam nostro et sociorum nostrorum in Asia imperio, terminis utrimque coniunctis et in perpetuum stabilitis, nullo certamine commisso, sed populo utroque in Asia saltem pariter invicto,

“paribus se legibus ambae  
invictae gentes aeterna in foedera mittant.”

Duco ad vos pacis ministrum insignem, iuris Gentium Instituti quondam praesidis vicarium, professorem Petroburgensem, FREDERICUM DE MARTENS.

It is interesting to note the names of the Members and Associates present. *Germany* sent Dr. De Bar, H. Hamburger, F. Perels, and F. Stoerk; *Austria*, H. Lammasch; *Belgium*, G. Rolin-Jaequemyns and Ed. Rolin; *Denmark*, H. Matzen; *France*, E. Clunet, Ch. Lyon-Caen, L. De Montluc, A. Darras, J. A. Lainé; *Greece*, M. Kebedgy; *Italy*, A. Sacerdoti, J. C. Buzzati, and E. L. Catellani; *The Netherlands*, Deen Beer Poortugael; *Portugal*, F. Beirão; *Russia*, M. De Kapoustine and F. De Martens; *Switzerland*, E. Lehr and E. Roguin; while *Great Britain* was represented by the President of the Institute (Mr. Westlake, LL.D., Q.C.), Lord Reay, Sir D. Mackenzie Wallace, Professor Holland, Professor Goudy, T. Barclay, J. T. Lawrence, Professor Leech, and Sir Sherston Baker: there being thirty-two in all, or about one-half of the actual number of Members and Associates.

After the conferring of the honorary degrees, the Mayor and Corporation of Cambridge received the members of the Institute at the Guildhall; and they were entertained in the evening at dinner by the Master and Fellows of Trinity College; the Vice-Chancellor (Rev. Augustus Austen Leigh, M.A.), the Mayor of Cambridge, the Senior

\* *Traité conclus par la Russie*, Vol. ix. (x.), 1892.

† *Russia and England in Central Asia*, pp. 130, 1879.

Dean (St. John Parry), Professor Clark, Professor Allbutt, Dr. Kenny, the Public Orator (Dr. Sandys), Sir G. M. Humphry, Professors Sidgwick, Stanton, Lewis, Tomson, Hughes, Forsyth, Beven, and others, being present.

On August 9th the business commenced by the reading of the Report of the Secretary General (M. Lehr), in which he referred to the losses sustained by the Institute by the deaths of Mr. Dudley Field, Mr. Hall, and M. Leuder, as also by the resignation through ill-health of M. Aschehoug. After the close of the Report the various Committees on questions of International Law commenced their proceedings, which were continued during the whole Session; but it was of necessity impossible within the limited time allotted for the meeting at Cambridge for all the questions on the agenda to be discussed or entertained. Nevertheless considerable pains and attention were bestowed on the following by the members of the Committees to which they severally belonged, and some were afterwards adopted by the whole body of the Institute assembled in open Sessions. The questions which were fully discussed before Committees were: 1. *On the guardianship of persons of full age*; 2. *On the penal sanction to be given to the Convention of Geneva*; 3. *On Contraband of War and prohibited Consignments*; 4. *On diplomatic immunities*; 5. *On the conflict of laws in matters of nationality*; 6. *And On the revision of the Convention of Berne of 9th September, 1886, creating an International Union for the protection of literary and artistic works.* It would not be possible within the narrow limits of a Magazine to particularize every question discussed; we will, however, mention that the Institute pronounced on the question of the guardianship of persons of full age in the following terms:—"The restraint of persons of full age is regulated by their national law; in principle, restraint can only be decreed by the competent authorities

of the country to which the person in question belongs by nationality. The authorities of the country where he resides ought on all occasions to decree definite or provisional regulations both as regards the person and his goods." With regard to the penal sanction to be given to the Convention of Geneva, the Institute proposed as follows:—"Draft of a Convention supplementary to that of 22nd August, 1864. The Governments of —, wishing to give reciprocally a proof of their firm desire to assure the observance of the Convention of Geneva of 22nd August, 1864, by the persons and in the territories submitted to their authority, are agreed as follows:—Art. 1. Each of the contracting parties engages itself to elaborate a penal law providing against all the possible infractions of the Convention of Geneva. Art. 2. Within three years these laws ought to be promulgated and notified to the Swiss Federal Council, which will communicate them by diplomatic means to the Powers who signed the Convention of Geneva. The changes that one or other of the contracting States may afterwards cause in its penal code shall also be notified to the Swiss Federal Council. Art. 3. The belligerent State which may complain that a violation of the Convention of Geneva has been caused by the other belligerent State, has the right to demand through the intermediary of a neutral State that an enquiry may be made. The accused State is obliged to make this enquiry through its own officials, to communicate the result to the neutral State which has served as intermediary, and to require, if there should be occasion, the punishment of the guilty parties conformably with the penal laws. Art. 4. The signatory States of the Convention of Geneva who shall not have subscribed to this Supplementary Convention may do so at any time, by a notification addressed to all the other signatory Powers, in the same form as that accepted for accessions to the Convention of 1864." The Institute



expressed a hope that the International Committee of the Red Cross might be called upon, by the various Governments, to assist in carrying out the above Supplementary Convention.

The questions of Contraband of War were reduced to nine propositions by the Committee, but the Institute refrained from dealing with them until next August.

With regard to Diplomatic Immunity the Institute agreed as follows :—“ Art. 1. Public Ministers are inviolable. They enjoy moreover ‘extraterritoriality’ in the sense and to the extent which is hereinafter formulated, and also a certain number of immunities. As to Inviolability :— Art. 2. The privilege of inviolability extends—first, to all classes of Public Ministers who regularly represent their Sovereign or their country ; secondly, to all persons making part of the official *suite* of the diplomatic mission ; thirdly, to all persons making part of the non-official *suite*, subject to the reservation that if they belong to the country where the mission is resident they shall not enjoy the privilege except in the hotel of the mission. Art. 3. It obliges the Government to whom the Minister is accredited to abstain towards the persons who are privileged from all offence, injury, or violence, to give an example of the respect which is due to them, and to protect them by specially severe penalties from all offence, injury, or violence, on the part of the inhabitants of the country, so that they may be at liberty to exercise their functions with all freedom. Art. 4. It applies to all that is necessary to carry out the above duties ; notably to the personal property, the documents, the archives, and the correspondence. Art. 5. It lasts during all the time that the minister or diplomatic official passes, in his diplomatic capacity, in the country where he has been sent. It exists even in time of war, between the two powers, during the time necessary for the minister to leave the country with his *suite* and effects.

Art. 6. Inviolability cannot be claimed: (1) in the case of legitimate defence on the part of private persons against the acts committed by the persons themselves who enjoy the privilege; (2) in the case of risk incurred by one of the said persons voluntarily or without necessity; (3) in the case of reprehensible acts committed by them and provoking on the part of the State, to which the minister is accredited, measures of defence or of precaution; but except in the case of extreme urgency this State ought to limit herself to signify the acts to the government of the said minister, to demand the punishment or the recall of the guilty agent, and to cause, if possible, isolation of his hotel to prevent illicit communications or manifestations." • As to Extraterritoriality, the Institute determined that a public minister, the functionaries officially attached to his mission, and the members of their families living with them, preserve the domicil of origin, and remain subject to the laws of that domicil, in so far as the domicil governs the laws and the jurisdictions. Their succession commences from the said domicil, and the local authorities have no right to interfere unless required by the head of the mission. The acts of a public minister should be conformable to the *lex loci*, under certain circumstances laid down very fully by the Institute. With regard to immunities in matters of taxes, it was agreed that it belonged to each government to indicate the exceptions in that behalf. With regard to immunity from local jurisdiction, the meeting followed the existing rules of international law as laid down by the chief publicists.

On the question of the conflict of laws in matters of nationality, the Institute adopted certain general principles which may serve as a basis for the future labours of the Committee.

The Institute recommended certain modifications to the attention of the forthcoming Diplomatic Conference

charged with the revision of the Convention of Berne of 9th September, 1886, and creating an International Union for the protection of literary and artistic works.

The sittings of the Institute closed on the 14th of August. During that time, the members of the Institute received every attention from the University, from Dr. and Mrs. Westlake at Trinity Hall Lodge, which the Master kindly allowed them to occupy, from the Mayor of Cambridge, from Girton and Newnham Colleges, and from the Union Club. The short time spent within the classic area of the University was both of instruction and of interest. Each member was fully imbued with a sense of personal responsibility to do his best to preserve the peace of the world by means of International Law, and to make the influence of the Institute, in matters doubtful, more and more felt. It may still be far from the happy time when the lion will lie down with the lamb, and swords shall be turned into pruning-knives, yet every member of the Institute felt seriously at heart that the day was drawing nearer and nearer when brute force and the savagery of arms shall yield to the principles of law and justice and to the dictates of equity.

A MEMBER OF THE INSTITUTE.

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## II.—THE SINKING OF THE “KOW SHING.”

NOW that Celestial souls have once more demonstrated their capacity for entertaining an inconvenient amount of wrath, and the Descendant of the Sun has entered upon successful conflict with the Lord of the Dragon, it may not be amiss respectfully to invite the Occidental mind to preserve its equanimity undisturbed while contemplating the upheavals of the East.

The almost unanimous shrieks of horror with which the newspapers of this country, without distinction of political creed, received the intelligence of the sinking of the *Kow Shing* are a little difficult for the impartial observer to understand. It is impossible to be sure that one is right in admiring more the ignorance of International Law displayed in these declamatory effusions, or the writers' entire conviction of their own ability to instruct Japan in the elementary principles of that science. One is driven to adopt the hypothesis that, as Bunthorne puts it in *Patience*, “Nature hath this decree,” that as a red flag is to a bull, so is the sight of the red ensign in an unenviable position to the British leader-writer. He may (if he is gifted) meander with philosophic calm through the mazes of Home Rule and the Higher Criticism; but shew him that crimson bunting treated by foreigners without the requisite amount of awe, and you may have reason to repent your temerity. After that revelation of their malignity, he finds it easy to believe that the responsible parties proceeded to fire on their drowning enemies.

It is no sign of a proper sense of national dignity to exhibit an irritable sensitiveness to everything having a superficial appearance of disparagement to it, whether justifiable or unjustifiable. No apology, therefore, is needed

for urging that the honour of Great Britain demands from those who value it most highly, a cool and impartial treatment of such questions as have arisen during the progress of the war. And to those who set this value on their country's dignity—and few of this MAGAZINE's readers will fail to do so—are submitted the following remarks on the law bearing on the case of the *Kow Shing*.

Very shortly to recapitulate the facts. At a time when Chinese and Japanese troops were facing each other with hostile intent in Corea, the *Kow Shing*, a British-owned vessel, sailed with reinforcements for the former. She and her escorting gunboat were met on the passage by the Japanese cruiser *Naniwa*—(*Naniwa Kan* simply means "H.M.S." *Naniwa*)—an Elswick-built warship of the celebrated *Esmeralda* type, carrying two very heavy guns, but unarmoured. The *Naniwa* sent a boat to visit the *Kow Shing*, and her English captain was prepared to comply with the requisition of the boarding officer that she should be taken to Japan. The Chinese soldiers, however, and their generals, absolutely refused to permit anything of the kind; and, as the only way of effectively ensuring the failure of the expedition, the Japanese commander was obliged to sink the transport.

Let us suppose, firstly, that war had not broken out at the time of the occurrence, and that the unfortunate vessel in question was a peaceful transport engaged in trooping operations. Yet the moment such operations became fraught with serious danger to Japan, that Power became entitled to use such measures as might be found necessary for securing her safety. This is amply demonstrated (if demonstration were needed) by the cases of the *Caroline* and the *Virginus*. The *Caroline* was, as is well known, a steamer engaged in supplying the Fenian insurgents of 1837 with support from the United States. Canadian troops found her moored in United States territory, and so

under the protection of a friendly government. They sent her over the Falls of Niagara without scruple. The *Virginus* was seized by Spain in 1873, whilst engaged in a filibustering expedition against Cuba under cover of a United States register and flag. In both these cases a vessel under the apparent protection of a friendly nation was captured while employed on service involving serious risk to the captor's state, which risk there was no possibility of preventing by diplomatic remonstrances addressed to that nation's government. In both it is universally admitted that a prompt explanation of the necessity which dictated the capture, and an apology for the apparent discourtesy involved, were the utmost that could be required by the latter.

It needs scarcely a word to apply the principle of these cases to our subject. The *Kow Shing's* object was one of immediate danger to the Japanese. If successful, it might have altered their whole position in Corea. Is it consistent, not merely with military convenience, but with common sense, to say that a warship may not crush an attempt, made when war is imminent, to throw troops into a position where they would form a serious and immediate danger to her country's forces, simply because such attempt is styled a mere trooping operation and conducted in a hired transport?

But our supposition that war did not exist is too liberal. Whatever does or does not constitute a state of war, it is nothing short of amazing that in the present year of grace it is still so commonly imagined that a formal declaration is necessary to initiate it. After all our discussions about the "First Blow," and the alarming suddenness with which that strategic masterpiece is going to be dealt, it seems that we really do expect the stealthy marauder to give us fair and proper notice of his dark designs!

Perhaps the idea is induced by an undue indulgence of the appetite for accounts of naval manœuvres, which are of more frequent occurrence than war. For will it be believed, that during the stirring century-and-a-half which elapsed between 1730 and 1871, no more than ten declarations of war are said to have been made? And yet an average newspaper, with no particular reputation for jocularly, finds the opportunity for a mild display of humour too good to be lost, and informs its readers that the anomaly of fighting before the declaration of war is only what might have been expected, as a natural outcome of the Mongolian tendency to invert the practice of the blameless Europeans—just as they mount their horses on the off-side, and turn their keys from left to right.

Supposing that no warlike operations had taken place before the *Kow Shing* sighted the *Naniwa*, yet there is no reason why it should not have been perfectly competent to the latter to commence them by stopping the carriage of contraband and reinforcements to the Chinese in Corea. It is absurd to say that this could not be done against neutrals unless war had *previously* been commenced by declaration or hostile acts between China and Japan alone; it is still more unpractical to assert that the *Kow Shing's* knowledge of the existence of war would have had to be proved before she could be affected by it. If that were so, a Commander might sit on his bridge with folded hands and devote his attention to the scenery while a fleet of ships sailed past him laden with ammunition for the use of his prospective enemy. Circumstances might render a formal declaration impossible at that moment; and it might be equally inadvisable, and a little laughable, to fire a shot *pro formâ* at the enemy's coast, and then claim that the neutral ships had had notice of war, or at least that war had really begun, and that they had straightway become amenable to belligerent jurisdiction.

The effective stoppage of contraband, much more of troops, is an operation of war as much as is a bombardment. A nation which chooses to commence active hostilities by this means in preference to undertaking other enterprises against her adversary is perfectly entitled to do so, and need issue no declaration of war; though courtesy dictates that neutrals should be informed of the situation without undue delay.

But not only was the *Naniwa* entitled so to commence hostilities, and, if necessary, afford thereby the first act which could be construed as evidence of the existence of war; but she needed not to rely on this liberty. For war had already begun.

It is the mere trifling of pedantry to say that war does not exist until an act of open violence is committed on one side or other, or some formal declaration is made. Such an assertion confuses the *state* of war with the *operations* of war. The existence of the immediate intent to wage war on the part of either government, evidenced by any acts whatever on the part of itself or its agents, is the essential thing. An overt act, be it the firing of a shell, the despatch of a vessel on a hostile mission, or the issue of a manifesto, is mere evidence, more or less conclusive, of the fact.

Even the imposing declarations proclaimed with all the circumstance of heralds and trumpets, to which the amateur politician clings with such tenacious solicitude as indispensable harbingers of the fray—even these almost invariably set forth, not that the parties "will thenceforth be," but that they already "are" in a state of war.

And, by the time of the voyage of the *Kow Shing*, it is clear that the mutual intentions of the Chinese and Japanese governments had reached that unpleasant climax. The very act of the former in reinforcing their position in Corea, in the full knowledge that Japan would do her best to prevent the success of any such movement, is, as a well-



known authority has pointed out, sufficient evidence of the *animus belligerendi*.

If war had begun at or before the date when the transport sailed, no one doubts the *Naniwa's* right to capture, and, if necessary, sink her, for conveying troops to the enemy.

But, finally, war or no war, is Great Britain affected by her fate? In other words, was she entitled to the character of a British ship?

For the conduct of a British ship, the British government is responsible. How could it be responsible for the acts of the *Kow Shing*?

She was chartered by the Chinese government, manned in part with a Chinese crew, and crowded with Chinese soldiers. Chinese generals dictated to her navigating officers—she was escorted by a Chinese gun-boat. The destination of her passengers was not in doubt: it was to operate against the Japanese in Corea. She was not a neutral carrier of military passengers. She had for the time being become identified with the warlike forces of China engaged on a hostile errand. The position involved its liabilities and responsibilities, and to them she succumbed. Even though it should be held that her despatch was not an act evidencing the existence of war, and that war did not at that time exist—yet her entire absorption into the Chinese naval force would be sufficient to justify her treatment in the same manner as the warship which accompanied her. Otherwise a nation might deal any covert blow she liked at her prospective enemy without fear of interference, if only she took care to employ neutral agents.

The Channel squadron (let us say), war with France being imminent, falls in with a French army corps embarked in a miscellaneous fleet of hired transports. The troops have been despatched, not for the immediate invasion of England, but to lie off the coast in a favourable

position to await the psychical moment for effecting a landing. It is safe to say that the officer who should let the vessels pass in safety on account of their "neutral character" would not for long remain an Admiral; or, for the matter of that, a British sailor.

Let us extend to our island admirers of the Far East the fair-play which we claim for ourselves. On the ground of self-defence against imminent danger—on the ground of the right to wage war by excluding reinforcements for the enemy, whether other hostile acts had occurred or not—on the ground that a vessel engaged in the immediate furtherance of Chinese military measures against Japan, and sailing under the entire control of Chinese troops, was virtually a Chinese government ship—it is clear that the lamentable occurrence was no "atrocious," but the lawful exercise of an unassailable right.

TH. BATY.

### III.—HIRE-PURCHASE AGREEMENTS.

A RECENT decision of the House of Lords renders it opportune to discuss the law relating to hire-purchase agreements. By the hire-purchase system, an intending purchaser of goods is put into immediate possession thereof, and agrees to pay a fixed sum of £x. by fixed periodical instalments—the amount payable for each instalment is expressly declared to be nothing more than hire money for the use of the goods during the period intervening between two consecutive instalments—and the lender agrees that on a certain number of instalments making up the total sum of £x. being paid, the hirer shall become the owner of the goods. On default in the punctual payment of any instalment, power is reserved to the lender to resume

possession of the goods. A similar power is given to him in case the hirer fails, when called upon, to produce the insurance and rent receipts of the premises where the goods are, allows the goods to be taken in execution for a debt, becomes bankrupt, shifts the goods to other premises without consent of the lender, or in any way attempts to part with the possession of the goods.

So long as the hirer choses to pay the instalments regularly, the lender has no option to determine the contract and resume control over the goods. It may also be mentioned that in almost every branch of trade in which the hire-purchase system prevails, such as piano, furniture, &c., there is usually a recognised society composed mostly of the members of the particular branch of trade, whose object is to see that the system is honourably kept up, and that a mere fortuitous failure to pay an instalment is not made the means of depriving the hirer of the benefit of his contract altogether. Provided a percentage of the number of instalments has already been paid, the rule imposed, by the society on the trade, is that on default in payment of an instalment, the lender may remove the goods to place of safety and keep them there three months, at least, before resuming plenary ownership. During that time, the hirer has the option of taking up the contract at the point it was broken off by liquidating the arrears and the expenses of removal.

The hire-purchaser may of course terminate the agreement by refusing to pay an instalment, or expressly by returning the goods. There is nothing in a usual agreement of the kind to force on him the continuation of the contract against his will. It may therefore be stated that one of the implied terms of such an agreement is the power of the hirer to put an end to it, at any time, at his option. However, in most, if not in all agreements, at least, those of recent date, a clause reserving this option

is usually inserted. As the decision of the highest appellate tribunal has turned mainly on the presence of this express clause, it has been thought necessary to draw here the attention of the trader to this point.

It will be apparent from this survey that as against the lender, a hire-purchase agreement is considered in the trade as something more than an ordinary hiring agreement, inasmuch as the hire-purchaser may, within three months of default in the payment of any instalment, bridge over the breach of the contract caused by such default. Even at law, it is something more than an ordinary hiring agreement, for liquidation of all the arranged instalments transfers the ownership to the hire-purchaser. As against the hire-purchaser, the agreement has all the incidents of an ordinary hiring agreement. But is it so in fact? Let us see. It is a matter of common knowledge that usually a small deposit has to be paid to the lender at the moment a hire-purchase agreement is entered into. Sometimes it is expressed to be an instalment paid in advance, and this, of course, will not make it different from an ordinary agreement for hire. Sometimes it is mentioned as a mere deposit, which is not returnable in case the hire-purchaser terminates the agreement; but which, when all the instalments have been paid, is to be added to the total of these instalments, in order to make up the fixed sum of £x. We may excusably infer that a deposit on such terms turns the hire-purchase agreement into a contract for the sale of goods. In support of this view, we may also adduce the fact that usually the hire-purchaser has the option at any time to liquidate the amount due on all future instalments at a rebate of five to ten per cent. In other words, he may at any moment say to the trader: "Of the agreed price of the goods, £110, instalments already paid up have now covered £10. I am now minded to close the balance of £100 at its present value of £90 (or £95, as the case may

be)"; and he will be able to enforce his views against a recalcitrant trader, for most firms offer that as an inducement at the inception of the contract. However plausible this may be, a little reflection will reveal the other equally strong, if not stronger, side. For the deposit may be regarded as whole or part of the consideration for the option of purchase vested in the hire-purchaser; and the accounting by the lender for the deposit when all the instalments have been paid, is a consideration for the full discharge of all the instalments by the hire-purchaser. The rebate is a consideration for paying off the future instalments in a lump sum.

A greater difficulty is raised by the question whether the rent for an ordinary hire of the goods would have been less than the amount of each instalment of the hire-purchase. For it may be urged, that if the amount of hire would be less, the hire-purchase is clearly a contract of sale; if not, there is no consideration moving from the hire-purchaser for the transference of ownership when the last instalment is discharged. If the hire would be less, there is no gainsaying the fact that there is a contract of sale, unless we regard the difference in the two amounts as whole or part of the consideration moving from the hire-purchaser for the waiver by the lender of his right to terminate the contract of hire at his will—a view which may or may not be supported by the effect of a similar clause in an agreement for the tenancy of lands or houses. Whether the rent on hire would be less or not, the consideration for change of ownership at the expiration of the fixed period is, at least in part, the continuance of the hire-purchaser with the contract till that period, that is, is the waiver of his right of rescinding the contract earlier. Hence, when next litigation ensues on one of these agreements, it will be as well to ascertain from the lender whether he would have charged the amount of an instalment as rent on an ordinary hiring

contract, so that the opinion of the Court may be elicited expressly. In the cases which have up to now engaged the attention of the Courts, it has been tacitly assumed that there would have been no such difference in the payments.

There is yet another point to be noticed. Suppose the price agreed for the goods, that is the £x., is £20 19s. 6d. A deposit of £1 is paid and the instalment is 15 shillings every four weeks, or three shillings and ninepence every week. It will be seen that the amount covered by the deposit and twenty-six four-weekly instalments will be £20 10s., leaving a balance of nine shillings and sixpence. I believe I am right in saying, that the usual clause in the agreements is that if the hire-purchaser should have paid by his deposit and by the four-weekly (or weekly, as the case may be) instalments the sum of £20 19s. 6d., he should become the owner of the goods. Suppose the agreement is to pay every four weeks. The deposit and twenty-six payments cover only £20 10s., leaving a balance of nine shillings and sixpence. Can the letter insist on the payment of 15 shillings (*i.e.*, five shillings and sixpence more than the total price of £20 19s. 6d.) for the twenty-seventh instalment? Or suppose, again, that the proper construction of the contract in the eye of the Court be, that after £20 10s. has been paid, the hire-purchaser should pay the weekly sum of three shillings and ninepence—a rather strained construction—till the total comes to £20 19s. 6d. Two weekly instalments will account for seven shillings and sixpence, and leave a balance of two shillings. Can the letter insist that the third weekly instalment should be three shillings and ninepence, *i.e.*, one shilling and ninepence more than the price? If the hire-purchase is a purely hiring agreement, there is at least some reason for saying that he can insist on the payment of 15 shillings or of three shillings and ninepence for the final instalment. But then he will be pocketing more than his due. If he

cannot demand more than nine shillings and sixpence, or two shillings for the last four-weekly or weekly payment, it seems very difficult to see how a hire-purchase agreement is a purely hiring agreement. It would be worth while in some future case to bring out this point clearly.

Hence, with the possible exceptions above suggested, a hire-purchase agreement is a hiring agreement, and the hire-purchaser is not a purchaser of the goods by force of the agreement, so as to come within the exception to the Common Law doctrine of *Nemo dat quod non habet*, created by sect. 9 of the Factors' Act, 1889. This tallies with the decisions given in cases where others have attempted to bring the agreement within the definition of a bill of sale contained in the Bills of Sale Acts 1878 and 1882. It has been there held that a hire-purchase agreement is not a bill of sale, for it is not an instrument by which the ownership of the goods is transferred to the hirer. It is the last payment, and not the agreement, which constitutes the title and transfers the ownership (*Ex parte Craucour, In re Robertson* (1878), 9 Ch. D. 419). It has been laid down in *McEntire v. Crossley Bros.* (1895), 99 L.T. 61, that on the bankruptcy of the hire-purchaser, the goods comprised in the hire-purchase agreement do not pass to the trustee in bankruptcy.

The view that a hire-purchase is a conditional purchase will not help to bring a hire-purchaser within the meaning of the term "purchaser" in sect. 9 of the Factors' Act, 1889. Sect. 17 (1) of the Sale of Goods Act, 1893, provides that, "Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred"; and an ordinary hire-purchase agreement expressly stipulates that the property shall not pass till the total sum of £x. is paid. That the word "purchaser" has the same meaning in the Factors' Act

and in the Sale of Goods Act, is shown by the adoption of sect. 9 of the former statute in sect. 25 (2) of the latter, and the definition of buyer in sect. 62 (1).

Now, we will examine two cases of extreme importance to the hire-purchase trade. In the first of these, *Lee v. Butler* (1893), 2 Q.B. 318, A. obtained possession of some furniture from B. under the following agreement: She was to pay £1 on May 6th, and £96 4s. on August 1st, 1892, these sums were to be considered as rent, and no change in ownership was to take place till the whole of the £97 4s. had been paid. B. was given the power of resuming possession of the goods in case there was default in payment, and any sums paid by A. up to that time were irrecoverable by A. A. paid £1 and afterwards sold the goods to C. B. claimed the goods from C., but he was held not entitled, for A. was a purchaser under sect. 9 of the Factors' Act, and therefore could convey an indefeasible title to *bonâ fide* purchaser for value. It will be seen that the agreement in this case was totally different from the ordinary hiring agreement, and was in fact a contract of sale though expressed in the form of a hire-purchase. A. could therefore be rightly considered as purchaser within sect. 9. The next case is *Helby v. Mathews* (1895), 11 *Times* L.R. 446. There, A. obtained possession of a piano under the following agreement: She was to pay 10s. 6d. every month in advance by way of rent for the use of the piano, value £18 18s. Should she pay all the thirty-six instalments, making up the sum of £18 18s. (but not before) she was to become the owner of the piano. On failure to pay any instalment, etc., the lender could resume possession of the instrument, and an express clause conferring on A. the right of terminating the contract at any time was inserted. After paying some of the instalments, she pledged the piano with C. In an action by the latter against C., the County Court Judge decided in favour of the



letter. This was affirmed in the Queen's Bench Division, but reversed on appeal. *Lee v. Butler* was relied on, and the Master of the Rolls (Lord Esher), said that A. having an option of terminating the contract of hire at any time, became the purchaser as soon as she put it out of her power to exercise the option by pledging the piano. It is a well-known rule of law that the exercise of an option is of no avail as the party to be affected by it unless he has some express or implied notice. But there was a complete absence of any such notice to the lender. See also sect. 18 (4) of the Sale of Goods Act, 1893. Hence the main prop on which the judgment rested falls to the ground. The House of Lords had no difficulty in summarily disposing of this reasoning, and affirmed the decision of the County Court and the Queen's Bench Division. The Lords' distinguished the case from *Lee v. Butler* on the ground that the express power of terminating the agreement given to the hire-purchaser made the agreement one of pure hire. Even without this the two cases are easily distinguishable.

We might infer from the prominence given to the express clause that in an agreement without it the decision would be different. We have seen that in an ordinary hire-purchase agreement—and in *Lee v. Butler* the agreement was not of the ordinary type—the power given by the express clause is an implied term. Hence the omission of the clause from an ordinary hire-purchase agreement ought not to make any difference in the rule laid down by *Helby v. Mathews*, unless we interpret the maxim *expressum fecit tacitum celare* in a manner totally different from what it has been up to the present. For the maxim has been held to mean that when there is a divergence between the express and implied terms the express term prevails; and not that when the express and implied terms are identical their legal effect is diametrically opposed.

M. L. AGARWALA.

## IV.—A NEW POINT OF BUILDING SOCIETY LAW.

THE recent decision of Stirling, J., in *Botten v. City Suburban Permanent Benefit Building Society*, 1895, 2 Ch. 441, has again brought into notice a point of great interest to the members of Building Societies. The point admits of short statement :—Can the statutory majority of the members of a Building Society required by sect. 32 of the Building Societies Act, 1874, for the due execution of an Instrument of Dissolution under that section, by a provision in their Instrument of Dissolution, effectually deprive unadvanced members of the priority which they have acquired under the rules, in virtue of duly matured notices of withdrawal?

This question was, in May, 1894, answered in the affirmative by Kekewich, J., in the case of *Kemp v. Wright*, 1894, 2 Ch. 462, whose decision on this point was not the subject of an appeal, and does not seem to have excited the interest which it deserves. It was answered in the negative by Stirling, J., in the case above referred to, an answer which will tend to re-assure withdrawing members whose notices have matured, and to “give pause” to those other members of unsuccessful Building Societies who must have seen, in the decision in *Kemp v. Wright*, the revelation of a short and easy method of benefiting themselves, at the expense of an unwilling minority, by repudiating, in due form of law, such part of their bargain as seemed, in the events, to be to their prejudice. As the point in question seems to have been absolutely new in 1894, a short statement of the facts on which it arose will not be out of place. Certain unadvanced members of the Charing Cross “Model” Building Society had, by duly giving notice of withdrawal under the Society’s

rules, acquired a right to be repaid their subscriptions, in the order of the dates of their respective applications, in priority to the other members of the Society. The rules provided for their own alteration, and, having regard to the decisions of Chitty, J. in *Pepe v. City and Suburban Permanent Building Society*, 1893, 2 Ch. 311, and of Cave and Wright, JJ., in *Reg. v. Brabrook*, 69 L.T. 718, it can hardly be doubted that the priorities acquired in this way might, at all events under ordinary circumstances, have been varied or destroyed by an apt alteration of the rules, if the due formalities had been observed. What actually happened was this:—After the acquisition of the rights of priority referred to, a meeting of the members was convened for the purpose of considering the position and affairs of the Society. At this meeting a dissolution under sect. 32, sub-sect. 3 of the Act of 1874, by means of an Instrument of Dissolution read to the meeting, was resolved upon. No resolution for the alteration of the rule relating to the priorities of withdrawing members was ever passed. The Instrument of Dissolution, which was afterwards duly signed by a statutory majority of the members, contained the following clause (No. 5): “For all the purposes of this Instrument the term ‘member’ shall mean and include all members of the Society, whether they shall have given notices of withdrawal or not, and members who have given notice of withdrawal shall have no preference or priority over members who have not given such notice.” Some of the withdrawing members who had acquired priority signed this Instrument, and were separately represented at the hearing. It should be observed that the B.S.A., 1874, sect. 32, sub-sect. 3, requires that an Instrument of Dissolution shall set forth . . . . “(d) the intended appropriation or division of the funds and property of the Society,” and provides that “the Instrument of Dissolution . . . . shall be binding upon all the members of the Society.”

It will be seen that the view of the law taken by Kekewich, J., made it unnecessary to consider the question of a possible difference between the position of the withdrawing members who had signed the Instrument of Dissolution and that of those who had not. The learned Judge spoke of the advantage gained by giving notice of withdrawal as a vested interest, but a vested interest the acquisition of which did not determine membership, and which might be varied or defeated by an apt alteration of the rules. Then, noticing the argument of counsel for the withdrawing members who had not signed the Instrument of Dissolution, he admitted that such alteration of the rules had not in fact been made. He referred, however, to sect. 32 as introducing *ab extra* a statutory rule as to dissolution, which must be read into the Book of Rules of every Society to which the Act applied. The learned Judge concluded: "It is not denied that if the variation of the rights of members, which is now objected to, had been effected under the rules, it would have been sound, and no complaint could have been made. Why then should it not be capable of being done under legislative enactments such as I have mentioned? I think that a withdrawing member is as much liable to the parliamentary rule as to the private rules of the Society; and this having been done under the parliamentary rule, I think that the defendant [the representative of the withdrawing members who did not sign the Instrument] is bound."

The fault of this argument, be it said with respect, is that the conclusion does not follow from the premises, though the premises are undeniable. The rules of a Society under the Act of 1874 may, and usually do, provide for their own alteration,—they may, and usually do, indicate the process by which the Society may effect its own dissolution. Further, the Act of 1874, sect. 32, supplements the rule-book of every such Society by what

may justly be called an unalterable rule indicating one method of effecting dissolution. But a statutory mode of effecting dissolution is not the same thing as a statutory mode of altering rules. What the Legislature had to say upon the subject of the alteration of rules it said in sect. 18. Not only is sect. 32 silent on this head, but it would seem, on reflection, that this could not have been otherwise. For to dissolve is one thing, to alter rules another; the state of facts which must be pre-supposed in the one case is not the state of facts which must be pre-supposed in the other. Hence the two things cannot be effected *uno ictu* and by means of the same machinery. A Society altering its rules must be taken to contemplate the continuance of its own existence, at all events for a time, as a going concern; a Society proceeding to dissolve necessarily contemplates its immediate ending as a working Society. Some confusion of thought, however, seems to have arisen from a recognition of the fact that the effect of dissolution is to initiate a state of things in which many, if not most, of the Society's rules become dead letters as being inapplicable to the changed circumstances,—a confusion of thought, the appropriate corrective for which is to read the opening paragraphs of the judgment of the Master of the Rolls in *Re Blackburn, etc., Building Society*, 24 Ch. D. 421.

It should be observed that the destruction of the priorities of members who have given notice of withdrawal, when effected by an alteration of the rules in the ordinary course, is a very different matter from the destruction of such priorities by proceedings under the Statutory Rule of Dissolution, assuming for the moment that such a thing is possible. In the first case, the member whose priority is destroyed suffers, in most cases, no worse thing than having to wait a longer time for his money; in the second, it is, in nine cases out of ten, a question of

the *quantum* to be received. Moreover, in a question of altering a rule, the effect of which alteration is not only to vary priorities already acquired, but to alter the mode of acquiring priorities in the future, the action of the members who have not acquired such priority and who seek to make a change which will affect the interest of those who have, is guided more or less by the consideration that the alteration of the rule may affect their own interest in the future, by making it more difficult to get out on advantageous terms. The ostensible alteration of the rules by the insertion of a clause in the Instrument of Dissolution stands on a different footing. The considerations which may stay the hands of members when such an alteration of the rules in the ordinary way is proposed do not apply; from the nature of the case, a rule in the true sense of the word, intended to operate in the future, as well as to affect the conditions of the present, is out of the question. It is simply a stroke to effect a single immediate object, a blow struck at members who are in a beneficial position with regard to the distribution of the Society's assets (*Walton v. Edge*, 10 A.C. 33), by other members who are prejudiced by this beneficial position. It would seem, antecedently, that when a vested interest has been acquired under the rules of a Society, but subject to variance or defeasance, *in invitum*, by an alteration of the rules, the matter should be considered *strictissimi juris*, and the prescribed forms strictly observed. This consideration was strongly insisted upon by Stirling, J., in his judgment in *Botten v. City, etc., Building Society*, the learned Judge also relying,—it is respectfully submitted, very justly,—on the fact that Lord Herschell, in his judgment in the appeal of the mortgagor members in *Kemp v. Wright*, 1895, 2 Ch. 121, took a different view of the scope and effect of an Instrument of Dissolution from that taken by Kekewich, J. If the foregoing remarks on the substance of the matter, as distinct from the question of

form, are sound, the argument for the strict observance of the form is appreciably strengthened.

It is, indeed, quite possible that, in some future case, certain members of a Society, strong enough in number and interest to effectually execute a Statutory Instrument of Dissolution, and also to be able, under the rules, to pass a resolution varying the rules, may, before the passing of the resolution to dissolve, or the execution of the Instrument of Dissolution, go through the form of abolishing, in the prescribed manner, the rule dealing with the acquisition of priorities. This case, which is not that of *Kemp v. Wright* or *Botten v. City, etc., Building Society*, may be considered when it arises; but, if what has been said above is correct, it would seem at least arguable that the *bona fides* of the actors and the validity of the act might be successfully impeached by those whose interests were attacked. For it cannot be too emphatically stated that duly acquired rights of priority are rights arising out of the contract made by each member with every other member, and, although it is part of the bargain that a certain proportion of the contracting parties may, by alteration of the rules in the prescribed manner, and within the prescribed limits, vary the terms of the bargain and the rights of the other members, it is manifest that the exercise of a power of this kind should, in the interest of the minority, be very closely watched, and that the substance of the transaction, as well as the form, should be regarded. Probably, in such a case, one of the tests of "practical insolvency," or "stoppage, or recognised necessity for stoppage, of business," which have been applied to cases of alleged acquisition of priority, (*Re Sunderland 36th, etc., Building Society*, 24 Q.B.D. 394, and see *Earnard v. Tomson*, 1894, 1 Ch. 384, and *Re Ambition Investment Building Society*, 1896, 1 Ch. 89), will be applied to decide whether duly acquired priorities have, in fact, been destroyed.

The discussion of the subject would not, perhaps, be complete without a passing reference to an argument which was advanced in *Kemp v. Wright*, but was not noticed by Kekewich, J., or Stirling, J., in their respective judgments. It was based on sect. 32 of the Building Societies Acts, 1874, which provides that the Instrument of Dissolution shall set forth (*inter alia*) "the intended appropriation or division of the funds and property of the Society," and be binding on all the members. The drafting of the section, it may be, leaves something to be desired, but the suggestion that the effect of it was to give the signatories of an Instrument of Dissolution a free hand over the property of the Society and the rights of members was sufficiently answered by the argument of counsel on the first occasion. Since the judgment of Lord Herschell, already referred to, no possible doubt on the point can exist.

Assuming that the view of the law taken by Stirling, J., is correct, a question would still remain whether members who had acquired priority, but afterwards signed an Instrument of Dissolution containing a clause of the kind discussed, had by their signature waived or prejudiced their rights to any and what extent. This question does not seem to be of much practical importance, as it is hardly likely to happen again that members who have acquired priority under the rules will act in such a self-sacrificing spirit. On the other hand, until the Court of Appeal has had an opportunity of laying down the law on the subject, statutory majorities will probably still find it worth while to try to destroy priorities, the existence of which, in many cases, means that the unadvanced member, who has not given timely notice of withdrawal, gets nothing, or next to nothing, in the distribution of the assets of the Society.

T. K. NUTTALL..



## V.—FOREIGN MARITIME LAWS:

## IV. SCANDINAVIA.

## CHAPTER VIII.

*Collisions.*

ART. 219. Regulations for Preventing Collisions, which must be obeyed, are issued by the King.

220. When a ship or cargo has been damaged by a collision between ships and one side is alone to blame, such party indemnifies the other for the whole of the damage.

If both are to blame, the Court decides, taking into consideration the faults on both sides if and to what amount either shall compensate the other or whether each shall bear its own loss.

In deciding the question of blame the Court must especially consider whether there was sufficient time for a proper judgment to be formed.

B. 228, 229, F. 407, G. 736, 737, H. 534, 535, I. 661, 662, P. 665, 666, R. 419, 420, 451—463, S. 826, 827. E. 242.

Prior to the passing of this law the law in force in Norway and Denmark did not permit demurrage or loss of freight pending repairs to be reckoned as damages (2 R.I.D.M. 352, 8 R.I.D.M. 433), but in the former country actual expenses in port of refuge were allowed (*Ibid.*, but see 14 J.D.I.P. 221), and in Sweden in case of total loss nothing was allowed for anticipated profits (1 R.I.D.M. 101), and as no special provision is made in this Code for these cases they would probably be followed.

221. If the collision is purely accidental, or if it cannot be decided that it was caused by default on either side, each bears its own loss.

B. 228, F. 407, G. 737, H. 536, 538, 540, I. 660, 662, P. 664, 668, 669, R. 462, 464, S. 828, 830.

222. The owner is liable with ship and freight for compensation payable in accordance with Art. 220 if the

collision is caused by a person for whose acts he is answerable in accordance with Art. 8.

B. 7, F. 216, G. 452, 736, H. 321, I. 491, P. 492, S. 837. E. 30.

See Art. 8, *ante*, apparently this Article would make the shipowner responsible in the first instance where the ship was in charge of a compulsory pilot; see also 1 R.I.D.M. 182, 3 R.I.D.M. 102, 4 R.I.D.M. 328.

223. In case of a collision each Commander is bound, so far as he can do so without danger to his own ship and her crew and passengers, to render all possible assistance that may be required to the other ship, her crew, and passengers to save them from the consequences of the collision. Each of the Commanders must also give the other the name and port of registry of his own ship and places she is bound from and to.

If a Commander fails to comply with these regulations without reasonable cause, he is deemed to be in fault for the collision in the absence of proof to the contrary.

F. 1891 (4), (5), I. (M.M.C.) 120. In most civilised States there is some provision of Criminal Law analogous to this. See 10 R.I.D.M. 666, 673, and M.S.A. 1894, § 422. United States Statutes, 4th September, 1890.

The last clause does not appear in the Swedish version.

The offending Commander is also liable to a fine. See Art. 294, *post*.

## CHAPTER IX.

### *Salvage.*

224. Anyone rendering salvage services to a ship which is wrecked or in distress, or to her cargo, or to anything which has belonged to such ship or cargo, and all persons assisting in such salvage service, are entitled to salvage reward. If the parties cannot agree as to the amount of salvage, it will be settled by the Court.

The duties of salvors, more especially in the absence of the owner or his representative, are laid down in the special Stranding Law.

In Norway if the value of the salvaged property does not exceed 500 kronen (say £30) the award is made by the Amptman or magistrate.

The last clause is not in the Swedish version, but special directions are given in Sweden by a Law of 12th June, 1891.

As to the lien on ship and cargo for salvage, see Arts. 268 (i.), 276 (i.), *post* ; and as to salvage by crew of their own ship and cargo, see Art. 91, *ante*.

H. 560-562, I. (M.M.C.) 121, P. 681, 682, 685, 691.

225. In determining the amount of a salvage award, special consideration should be given to the following matters :—

- (1.) The danger to which the salvaged property was exposed, whether the crew have abandoned the ship, whether the crew assisted in the salvage, whether the salvage was rendered easier by the use of the ship's own appliances.
- (2.) The danger to which the salvors and their property were exposed, and the damage sustained by the salvors and their property.
- (3.) The skill and knowledge displayed by the salvors, and the time occupied and fatigue sustained in performing the service.
- (4.) The number of the salvors, the expenses incurred, and the value of the salvaging appliances.
- (5.) The value of the property salvaged.

H. 561, 563, I. (M.M.C.) 126, P. 685.

226. As a general rule an award of salvage should not exceed one-third of the value of the property salvaged, after deducting custom-house and other dues, and the expenses of preservation, valuation and sale. If, however, the salvaged property is of small value, or if the salvage has been effected under circumstances involving great danger or labour, a larger amount may be awarded.

The award includes payment for bringing the salvaged property into a place of safety and also for the use of lighters or other appliances.

I. (M.M.C.) 121, 134, P. 686.

227. If whilst the vessel was in distress a Commander or owner of ship or cargo has made a salvage agreement the

person liable to pay on the agreement may within two months after the agreement bring the question of amount before the Court, which can reduce the amount agreed on if it is considerably in excess of a reasonable payment for the service performed.

If it is agreed that the amount shall be settled by arbitration, or in any other similar way, the person liable to pay may repudiate the agreement if he does so within 14 days.

The Swedish version originally gave six months in which to move to set aside the agreement, and declared agreements to arbitrate the amount invalid. This was amended as from 1st July, 1894, and now runs as follows :—

“ If whilst the vessel was in distress a Commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may, nevertheless, have it reduced by legal process when the agreed sum is considerably in excess of what is fair. If the money has been paid whilst the danger existed the proceedings must be taken within six months from the date of payment, or they will be barred. If the agreement is that the amount of salvage shall be settled by arbitration or in any such way, it does not bind the person liable to pay the salvage if he gives notice of his repudiation of the agreement to the salvors within a fortnight of the day in which it was made.”

The Norwegian version has 14 days as the limit of time in both clauses.

H. 568, I. (M.M.C.) 127, P. 684.

228. If the salvors cannot agree as to the apportionment of the amount, the Court will apportion, having regard to the provisions of Art. 225. If a ship performs a salvage service whilst on a voyage, damages sustained by the salving ship and her cargo are first deducted from the amount awarded, and the owner receives two-thirds of the balance if the salving vessel is a steamship, and one-half if she is a sailing-ship. The Commander receives one-half of what is left and the crew the other half, the share of the crew being apportioned among them in proportion to their respective wages. Agreements by which the Commander or crew are to receive less than these proportions are invalid except in the cases of vessels fitted out expressly to

render salvage services, or where the agreement is specially made in respect to some special salvage operation.

I. (M.M.C.) 138, P. 688.

In the Norwegian version, if the salvaged property does not exceed 500 kr. (£30) the apportionment is made by the Amptman or Magistrate.

229. The salvors have a right to detain the ship or goods until the salvage reward is paid or security given for it.

B. 3 (6), G. 753, H. 313 (1), 548, 566, I. (M.M.C.) 121, 133, P. 689, S. 842.

The Norwegian version adds a clause stating that proceedings for obtaining salvage, or an apportionment may be taken either at the place where the salvage was effected or where the goods were brought in.

## CHAPTER X.

### *Marine Insurance.*

#### PART I.

##### *General Principles.*

230. Every lawful interest that can be assessed at a pecuniary value, and which is dependent on the fact that a ship or cargo exposed to perils of the seas is not lost or injured by such perils, may be the object of marine insurance

More particularly the following are objects of marine insurance:—Ship, Freight, Apparel and Furniture, Cargo, Anticipated Profits, Commissions on Goods, Bottomry Claims, Claims for Average, as well as other claims payable by ship, freight, or cargo.\*

An underwriter may re-insure the risk he has taken.

B. 168, F. 334 (1885), G. 782, 783, H. 593, 594, I. 606, P. 597, R. 538, 545, S. 743. E. 176.

231. An insurance may be effected either on a person's own account or on that of another, or without any statement as to whether it is on one or the other, in which case the words, "for account of whomsoever it may concern," or similar ones, are used.

\* See Arts. 268, 276, *post*, for these claims.

If an insurance is effected for another person without authority, the fact must be stated; if it is not stated, the insurance is invalid, even if the person on whose account it purported to be effected should subsequently approve it.

The underwriter in this case has also a right to retain the premium.

The last clause does not appear in the Swedish version, but see Art. 236, *post.*

P. 428.

232. The insurer must, if required, give a written acknowledgment to the assured (a Policy) that the insurance is in order.

The Swedish version makes it the duty of the insurer to give a policy in all cases.

P. 426.

233. The actual value of anything is its insurance value.

B. 171, E. 182, F. 339, I. 612, P. 435, 601.

234. If anyone fraudulently insures anything for an amount exceeding its insurance value, the contract or contracts, if there are more than one, are null and void.

B. 188, E. 199, F. 357, G. 790, H. 615, 622, 253, I. 608.

235. If anything is insured in good faith for an amount exceeding its value the insurance remains in force, but only for an amount equal to the insurance value.

If a thing has been insured with more than one insurer on the same day and against the same perils, each insurer is liable *pro ratâ* for the insurance value; if, on the other hand, the insurances have been effected on different days, then the younger or later insurance is only valid up to the amount of the insurance value not covered by the older one.

The later insurance, however, retains its validity.

(1.) When at the time it is effected all rights under the older insurance are transferred to the underwriters of the later policy.

- (2.) When at the time it is effected it is agreed that the new insurance shall only be valid so far as the assured is not covered by the previous insurance, either by reason of its invalidity or of the insurer's insolvency.
- (3.) When the earlier insurance has been effected on account of the assured, but without his authority, and the later insurance is effected at the request of the assured himself and that at the time the later one was effected the assured was either unaware of the earlier insurance or had renounced it.

B. 189, E. 200, F. 358, G. 790, H. 615, 622, I. 428, 608, P. 434, 435, S. 782.

236. When an insurance is invalid in whole or in part, either for want of interest in subject-matter, over insurance or double insurance, the insurer is nevertheless entitled to the premium, unless at the time he accepted the risk he was aware of circumstances which rendered it invalid.

The assured has, however, a right to a partial return of the premium in accordance with the provisions of Art. 266.

237. If the amount insured is less than the insurance value (233, *ante*), the insurer is only liable for damage in the proportion that the amount insured bears to the insurance value.

P. 433.

238. If the value of the thing insured is agreed at a definite amount, such value is legally binding upon the parties, but the insurer has a right to have the amount reduced if it can be shewn to exceed what might reasonably be considered the proper value at the time the insurance was effected.

B. 187, E. 182, F. 332, 339, G. 790, H. 612, 613, 615, I. 612, P. 435, 601, R. 551, S. 752, 754.

239. If the insurer has paid for damage, which the assured can recover from a third party, the insurer is subrogated to the assured in his claim against such third party.

If a creditor insures a claim for which he has a lien on something exposed to sea perils and the thing is injured or lost, the insurer is subrogated to the assured in proportion to the compensation he has paid him.

The assured can claim to be indemnified by the insurer, without being bound first to claim against the person who is liable to make compensation or to pay the debt.

See Art. 246, *post*.

P. 441.

240. If an insurer becomes insolvent, fails to meet a judgment debt or stops payment, the assured may rescind the insurance and demand the return of the premium, unless the insurer gives on demand security, for the fulfilment of the contract. If in such a case the thing insured has already been exposed to the risks insured against, the insurer may retain a proportionate part of the premium.

P. 438.

F. W. RAIKES.

## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Cleveland Message.

In his Message to Congress of the 17th December, 1895, on the Venezuelan Boundary Dispute, President Cleveland announced a new departure in the foreign policy of the United States as follows:—

“ The Balance of Power is justly a cause of jealous anxiety among Governments of the Old World and a subject for our absolute non-interference. None the less is the observance of the Monroe Doctrine a vital concern for our people and their Government. . . .

“ . . . . If an European Power, by an extension of its boundaries, takes possession of the Territory of one of our neighbouring Republics against its will and in derogation of its rights, it is difficult to see why, to that extent, such



"European Power does not thereby attempt to extend its  
 "system of Government to that portion of this continent which  
 "is thus taken.

" . . . . It is also suggested, in the British reply,  
 " . . . . that the Monroe Doctrine . . . . does not  
 "embody any principle of International Law which is founded  
 "on the General Consent of Nations. . . . . It may not  
 "have been admitted, in so many words, to the Code of  
 "International Law; but since, in International Councils, a  
 "nation is entitled to the rights belonging to it, if the enforce-  
 "ment of the Monroe Doctrine is something we may justly claim,  
 "it has its place in the Code of International Law as certainly  
 "and surely as if it were specifically mentioned. . . . .

" . . . . "The dispute has reached such a stage as to  
 "make it now incumbent upon the United States to determine,  
 "with sufficient certainty for its justification, what is the true  
 "divisional line between the Republic of Venezuela and  
 "British Guiana. . . . . I suggest that Congress make  
 "an adequate appropriation for the expenses of a Commission,  
 "to be appointed by the Executive, which shall make the  
 "necessary investigation and report upon the matter with the  
 "least possible delay. When such report is made and accepted,  
 "it will, in my opinion, be the duty of the United States to  
 "resist, by every means in its power, as a wilful aggression  
 "upon its rights and interests, the appropriation by Great  
 "Britain of any lands or the exercise of governmental juris-  
 "diction over any territory which, after investigation, we have  
 "determined of right to belong to Venezuela."\*

It is unnecessary here to consider the policy, logic, or  
 good taste of this Declaration by the Head of a great  
 State. It is sufficient for our purpose to criticise it as  
 affecting International Law.

"We may observe at once that the new doctrine is not  
 International Law, any more than the "Monroe Doctrine"  
 on which it is supposed to be based.

\* *Times*, 18th December, 1895.

The exact nature of the Monroe Doctrine has been examined at some length in a former volume of this Magazine (see *Law Magazine and Review*, Vol. XIV., p. 146, Art. on "Some Recent Incidents of International Law"), and is explained in a masterly manner in Lord Salisbury's Dispatch to Mr. Olney, to which President Cleveland's "Message" purported to be a reply.\* The "Monroe Doctrine," is simply a tradition of United States Foreign policy, and is to America very much what the "Balance of Power" doctrine has been for some centuries to Europe. No United States jurist has hitherto claimed it as a rule of International Law. Dana, in his edition of "Wheaton," expressly says "the Declarations are only the opinion of the Administration of 1823, and have acquired no legal force or sanction."†

Woolsey has expressed a similar opinion.‡

The importance, however, of President Cleveland's Message is that it seeks to establish an entirely new principle. A great deal of misconception has arisen as to what President Monroe actually enunciated, and it is worth while quoting *verbatim* those parts of his dignified and statesmanlike utterance which lay down precisely the three cardinal points of the famous Doctrine.

At the same time it is to be observed that they can only be properly understood when considered with reference to the historical circumstances by which they were evoked. (See as to these the *Law Magazine and Review*, Vol. XIV., Art. on "Some Recent Incidents," and for a complete account of the Doctrine see Wharton's *Digest*, § 57.)

\* See *Times*, 18th December, 1895, and see also article on "The Historical Origin of the Monroe Doctrine" in the *Times* of 8th January, 1896.

† See Dana's "Wheaton," § 67, note 36.

‡ See Wharton's *Digest*, Vol. I., § 57, p. 296.

Monroe in his seventh annual Message delivered on December 2nd, 1823, said :

“ The occasion has been judged proper for asserting as a  
“ principle in which the rights and interests of the United  
“ States are involved that the American Continents by the free  
“ and independent condition which they have assumed and  
“ maintained are henceforth not to be considered as subjects for  
“ future colonization by any European Power. . . . .

“ . . . . In the wars of the European Powers in matters  
“ relating to themselves we have never taken any part, nor does  
“ it comport with our policy to do so. It is only when our  
“ rights are invaded, or seriously menaced, that we resent  
“ injuries or make preparations for our defence. . . . .

“ . . . . The political system of the Allied Powers is  
“ essentially different . . . . from that of America. . . . .  
“ We owe it, therefore, to candour and to the amicable relations  
“ existing between the United States and those Powers to  
“ declare that we should consider any attempt on their part to  
“ extend their system to any portion of this Hemisphere as  
“ dangerous to our peace and safety. With the existing  
“ European Colonies we have not interfered, and shall not  
“ interfere. But with the Governments who have declared  
“ their independence and maintained it, and whose independence  
“ we have on great consideration, and on just principles  
“ acknowledged, we could not view any interposition for the  
“ purpose of oppressing them, or controlling in any other  
“ manner, their destiny by any European Power in any other  
“ light than as the manifestation of an unfriendly disposition  
“ towards the United States.”

A comparison of this Message with that of 1895 is instructive as shewing how far the latter goes beyond what was contemplated by the former. On the few occasions since 1823 when the Doctrine has been invoked, it has almost always been with great diffidence, and in a scrupulously delicate manner. The only extravagant attempt to apply it, previous to the recent Message, was

by Mr. Secretary of State Freylinghuysen, in his Dispatch of 4th January, 1883, when he contended that "on the ground that the decision of American questions pertains to America itself, the Department of State will not sanction an arbitration by European States of South American difficulties, even with consent of the parties" (See Wharton, § 57, p. 295). This principle did not apparently commend itself to subsequent Governments, and has certainly not been acted upon since.

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#### Dr. Jameson's Ride.

It looks as if a State Trial of more than ordinary magnitude will result from the ill-fated expedition which terminated at Krügersdorp on New Year's Day. A good deal of nonsense has been talked in the Press as to the offence for which Dr. Jameson and his comrades are liable. It is clearly not treason by English Law if the Transvaal is to be regarded as an independent State, and even assuming that the Convention of 1884 confers on Great Britain full suzerainty, it would be a remarkable retrogression to the worst days of "Constructive Treason" to hold that Jameson's action amounted to "levying war against the Queen." There is no precedent that we are aware of, in point, but it is worthy of note that by sect. 18 of the Interpretation Act, 1889, sub-sect. 4, "British India" is expressly contrasted with "the territories of any native prince or chief under the *suzerainty* of Her Majesty." It is practically certain that levying war against the Transvaal Government, even if Dr. Jameson's expedition amounted to this, would not be held to be Treason against Her Majesty.

It seems pretty clear that the prisoners will, if indicted at all, be charged with the offence of "fitting out an

expedition " under sect. 11 of the Foreign Enlistment Act, 1870, which provides that—

" If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty—

" Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State the following consequences shall ensue :

" (1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour.

" (2.) All ships and their equipments, and all arms and munitions of war used in or forming part of such expedition shall be forfeited to Her Majesty."

Sect. 12 enacts that—

" Any person who aids, abets, counsels, or procures the commission of any offence under this Act shall be liable to be tried and punished as a principal offender."

Sect. 13 of the Act further provides that—

" The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years."

According to Sect. 18 of the Act it would appear that the Cape Courts are competent to try the case, but it can be removed to England if " it appears that the removal would be conducive to the interests of justice."

Apparently sect. 12 would render the Directors of the Chartered Company liable to be indicted if their complicity in the affair could be proved.

The case will be the only one in which a " military expedition " by land has formed the subject of a criminal trial under the Foreign Enlistment Act, 1870. All the other cases, *i.e.*, *The Gauntlet*, L.R. 4 P.C. 184; *The International*,

L.R. 3 A. and E. 321, and the comparatively recent one of *R. v. Sandoval*, 16 Cox, C.C., 206, were instances of "naval expeditions." \*

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### *Private International Law.*

There have been several interesting decisions during the past few months.

*Carrick v. Hancock*, *Times* L.R., Vol. XII., p. 59, was an action on a foreign judgment obtained in the Swedish Courts against an Englishman domiciled and ordinarily resident in England. Objection was taken to it on the ground that the defendant had been served with the foreign writ while on a temporary visit to Sweden, and had only appeared and defended the proceedings by compulsion and for self protection. The Lord Chief Justice, however, held that the proceedings were regular and the judgment an enforceable one.

In the *Attorney-General v. Sudeley*, 15 Rep. (Nov., p. 271), the question of what property is liable to Probate Duty under an English will was considered. A testator had died domiciled in England leaving to his wife his personal property, including money invested in mortgages on land in New Zealand. The wife subsequently died, also domiciled here, leaving all her property, including the above-mentioned legacy, to Trustees for sale and conversion. The Court refused to follow the dicta in *In the goods of Ewing*, 6 P.D. 19, and held that Probate Duty was not payable in respect of the Colonial mortgages. The Court said in its judgment :

"The executors could not have recovered it (*i.e.*, the "New Zealand mortgage debts) here *virtute officii*. It was "no portion of her (the Testatrix's) estate in England, and "the general rule of Law appears to us to be applicable,

\* See *Law Magazine and Review*, Vol. XIV., p. 138.

“ by which the amount of Probate Duty is to be regulated,  
 “ not by the value of all the assets which an executor or  
 “ administrator may ultimately administer by virtue of the  
 “ will or letters of administration, but by the value of such  
 “ part as is at the death of the deceased within the juris-  
 “ diction of the Court by which the Probate is granted.”

In another case of *The Bristol Wagon Co. v. Gray*, *Times L.R.*, Vol. XII., p. 64, it was held that the Court had no jurisdiction under Order II, rule 1 (e) to allow service out of the jurisdiction of a writ on a defendant domiciled or ordinarily resident in Scotland or Ireland, even where the subject-matter of the action was a contract in which the parties had expressly agreed to consent to such service.

The fundamental rule as to the “ proper law of a  
 “ contract ” so clearly laid down by the House of Lords in *Hamlyn v. Talisker*, 1894 (Ap. Cas.), 202, was well illustrated in the recent case of *Crossland v. Wrigley*, 73 L.T.R., pp. 60 and 327, and 43 W.R., pp. 572 and 673. A domiciled Englishman effected three policies of insurance on his life in a New York office in favour of his wife and children. He died in 1892, and the question arose as to whether English or American Law governed the distribution of the policy monies. Kekewich, J., following the now well-established rule, held that the intention of the parties must determine the Law applicable, and that having regard to all the circumstances of the case, it was clearly intended that the interests to be taken by the beneficiaries should be decided by the “ Law of the Domicile of the parties insuring.” The Court of Appeal affirmed this view, Lindley, L.J., saying: “ The policy was a policy and a  
 “ voluntary post-nuptial settlement in one. . . . We  
 “ are concerned with the settlement aspect of the docu-  
 “ ment, and with that the American Law has nothing to  
 “ do.” The Court of Appeal, however, did not enter into

this point in detail, and the judgment of Kekewich, J., is certainly curious. That the Law applicable should be the Law intended by the parties to apply, is, of course, well established, but it seems difficult to conceive that the parties could have had in their minds an abstruse legal conception such as the *lex domicilii*. It would seem more reasonable to suppose that they simply contemplated the Law of England *as such*, applying, regardless of whether it happened to be the *lex domicilii* or not (*cf. In Re Barnard, Barnard v. White*, 56 L.T.R. 9).

JOHN M. GOVER.

## VII.—NOTES ON RECENT CASES (ENGLISH).

### Liabilities of Auditors.

THE Court of Appeal having held in the *Kingston Cotton Mill Case* that an auditor is an officer of the Court under sect. 10 of the Companies (Winding-up) Act, 1890, the Court of Appeal has now held that misfeasance covers every misconduct by an officer of the Company as such for which such officer might have been sued apart from the section. The charge against the auditors was that they, either knowingly or through a failure to use reasonable skill and care, certified accounts which they ought not to have certified. This is misconduct for which the company, either when solvent or in liquidation, could have sued the auditors, and recovered any pecuniary damage actually sustained by the company. In the present case, the charges of misfeasance came under two headings, namely, mis-statement as to the value of the mill and mis-statement as to the value of the stock-in-trade. In the case of a business of this kind, the mill and machinery come under the head of "fixed" or "permanent" assets, and the



respondents accordingly claimed protection under the decision of the Court of Appeal in *Lee v. Neuchatel Asphalte Company, Limited*, 61 L.T. 11; 41 Ch. Div. 1, and in *Verner v. Commercial and General Trust Company, Limited*, 70 L.T. 516; (1894) 2 Ch. 239. The case of *Wilmer v. McNamara & Co.*, 72 L.T. 552; (1895) 2 Ch. 245, dealing with an industrial undertaking, does not seem to have been quoted. Mr. Justice Vaughan Williams came to the conclusion that the cases cited were binding upon him, and he, therefore, decided this point in favour of the respondents. In his Lordship's opinion, the respondents to a misfeasance summons, in respect of dividends alleged to have been paid out of capital, are entitled to the benefit of the decisions given by the Court of Appeal in the case of perfectly solvent companies. As to the inaccuracy of the stock-in-trade, the value of the stock was accepted upon the statements of the manager, which had been authenticated by a certificate granted by him. Both the directors and the auditors, without enquiring further, had accepted the manager's statements, and had consequently been misled. Mr. Justice Vaughan Williams held, however, that though the directors were not negligent in accepting the correctness of the manager's facts, yet the auditors were responsible for misfeasance under sect. 10 of the Companies (Winding-up) Act, 1890, as they ought to have taken steps for testing the correctness of the manager's facts. The directors could not be made responsible for the valuation put upon the stock-in-trade. As regards the auditors, however, an assistant examiner in the office of the Official Receiver shewed that a detailed scrutiny of the figures would have disclosed a discrepancy in the amount of stock and the falsification of the stock would have been discovered. Even when the correct valuation of assets rests upon the evidence of experts, an auditor cannot receive such valuation as good, whether he shews in his certificate

the authority of such valuation or not. Auditors ought in some cases to go behind the valuation in order to protect themselves. Directors are justified in relying upon the auditor for the accuracy of the accounts. The accountants are very much hurt at this decision, as they consider that the Courts stretch previous decisions, based on particular cases, into general decisions, and make some auditors liable for leaving undone what another auditor may have left undone without incurring any responsibility.

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### **Bankers and Overdrawn Accounts.**

An uncommon case was that of *Buckingham v. The London and Midland Bank, Limited*. The plaintiff had been a customer of the bank and their predecessors for many years, and for a long time had had a current account and a loan account on the security of deeds of property. Finding himself rather short of money he (the plaintiff) went to the bank and asked the permission of the manager to allow him to overdraw his account up to £150. This was refused and the suggestion made that the account should be closed. On the day when the overdraft was needed the plaintiff saw the manager, said he had £700 odd to pay into his credit, and that he had given out his cheques. He was told that the current account was closed and the balance transferred to the loan account. The consequence was his cheques and bills were returned and his credit injured. For this he claimed damages in the Divisional Court, and the jury awarded him £500, and the verdict carried costs. The bank had no right to close the account without first giving due notice to the customer. It was endeavoured to shew that a banker being employed as agent by a customer to keep his accounts, custom allows the banker to close the account at any moment, but the jury, as the result indicates, considered that there was no such custom, and

the plaintiff ought to have been allowed to draw on his current account without reference to his loan account. In connection with bills and cheques an amusing tale is told of Lord Chancellor Redesdale, who was very slow in taking a joke. In a bill case before him he once observed: "The learned counsellor talks of flying kites. What does that mean? I recollect flying kites when I was a boy in England." "Oh my lord," said Plunket, "the difference is very great. The wind raised those kites your lordship speaks of—ours raise the wind." Everyone laughed but the Vice-Chancellor. It is not everyone, however, who knows this Hibernian metaphor for an accommodation bill. Flying kites is understood by most people as a term of political meteorology.

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#### **Joint-Stock Companies and Proxies.**

An extraordinary general meeting of a limited company was convened in order to pass a general resolution. According to the company's Articles of Association, it was provided that three persons present, either in person or by proxy, would be sufficient to form a quorum at the general meetings of the company. At this extraordinary general meeting the directors held proxies for nine persons and there were four other persons personally present. In the voting two of the persons personally present and the nine proxies voted for the resolution which had been proposed, and, therefore, the remaining two persons personally present voted against it. The question arose whether the resolution had been properly passed by a correct majority of three-fourths or not. The directors urged that the voting had been correctly carried out, but the other side contended that before the proxies could be counted a poll was requisite. Mr. Justice Kekewich, before whom this case, *Re Belcher Patent Smoke Preventer Company, Limited*,

came, took the views of the directors, and held that the chairman had a right to record the votes, as well of those present by proxy, as of those personally present. This is a practical and useful point for limited company petitioners.

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### **An International Point.**

Jurisdiction is based upon territorial dominion, and all persons within a territory owe temporary allegiance to the sovereign Power. The allegiance involves the duty of obedience to its laws and the lawful process of its Courts. The duty of allegiance is correlative to the protection which the persons within the territory of a foreign Power receive from its laws and institutions. Both the duty of allegiance and the correlative right of protection depend upon being in fact within the territory and such duty or right cannot become affected by a man being within the territory only for a week or a month. It is being within the territory that gives the right and length of residence as not material. If that is so, there is a clear right on the part of the legal Courts of the Country to initiate proceedings by the service of process upon a person within the jurisdiction. Such proceedings being lawfully instituted, subsequent proceedings are perfectly valid. These views on International Law are those given by the Lord Chief Justice in the case of *Carrick v. Hancock* in the Queen's Bench Division. The plaintiff was the British Consul at Gefle, in Sweden, and he had brought an action to recover from the defendant, a timber merchant at Newcastle-on-Tyne, a sum of £1,200, which had been awarded to the plaintiff by one of the Swedish Courts. The defendant had appointed the plaintiff his agent in buying and selling wood in Sweden. The defendant became indebted to the plaintiff under this contract, and the plaintiff took advantage of the defendant

being in Sweden, on a temporary visit, to serve him with a writ, and after several objections to the jurisdiction of the Swedish Courts had been argued, and the subsequent appeals heard and settled, the plaintiff obtained judgment and now sought to enforce it in the English Courts. The claim was, however, resisted by the defendant, as he contended he was not domiciled or ordinarily resident in Sweden when the writ was served upon him and he had put in an appearance to the action owing to pressure on him to the effect that if he did not do so he would be arrested. The Lord Chief Justice, however, held that the Courts had jurisdiction to demand obedience to their process against the defendant on the ground that he was within the protection of the State and owed obedience to its Laws. The ground upon which English Courts gave effect to foreign judgments was that foreign judgments created a legal obligation upon those against whom they were given. There was no reason for supposing that the judgment in question did not create a legal obligation on the defendant, and accordingly the judgment was for the plaintiff for the amount claimed. It appeared that this litigation commenced in the foreign Courts in 1889, and was not ended there until 1894.

T. F. UTTLEY.

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## Books Received.

*Taylor on Evidence.* Two Vols. Ninth Edition. By G. Pitt-Lewis, Q.C. Sweet and Maxwell, Ltd., London, 1895.

*The Publications of the Selden Society.* Select Pleas in the Court of Admiralty. Select Passages from the Works of Bracton and Azo. The Mirror of Justices. Bernard Quaritch, London, 1894 and 1895.

*Hindu Law in British India.* By Herbert Cowell. Thacker, Spink and Co., Calcutta. W. Thacker and Co., London, 1895.

*A Digest of Anglo-Muhammadan Law.* By Sir Roland Knyvet Wilson, Bart., M.A., LL.M. Thacker, Spink and Co., Calcutta. W. Thacker and Co., London, 1895.

*The Law of Parent and Child and Guardian and Ward.* By R. Storry Deans. Reeves and Turner, London, 1895.

*The Law of Building, Engineering and Shipbuilding Contracts.* By Alfred A. Hudson. Second Edition in two vols. Waterlow and Sons, Limited, and Stevens and Haynes, London, 1895.

*The Laws' Lumber Room.* By Francis Watt. John Lane, London, and McClurg and Co., Chicago, 1895.

*Restraints on Alienation of Property.* By John Chipman Gray, LL.D. Second Edition. The Boston Book Company, Boston, 1895.

*The Principles of International Law.* By T. J. Lawrence, M.A., LL.D. Macmillan and Co., London, 1895.

*Commentaries upon International Law ; Private International Law or Comity.* Vol. IV. Third Edition. By Sir W. G. F. Phillimore, Bart., D.C.L. Butterworths, London.

*Service out of the Jurisdiction.* By Francis Taylor Piggott, M.A. W. Clowes and Sons, Limited, London.

*The Law of Torts.* By J. F. Clerk and W. H. B. Lindsell. Sweet and Maxwell, Limited, London.

*The Revised Reports.* Edited by Sir Frederick Pollock, Bart., assisted by R. Campbell and O. A. Saunders. Vol. 1., 1785-90. Sweet and Maxwell, Limited, London.

*Le Gouvernement Local de L'Angleterre.* By Maurice Vauthier, Avocat à la Cour d'Appel. Arthur Rousseau, Paris, 1895.

*Hardcastle's Rules of Statutory Law.* Second Edition. By W. F. Craies. Stevens and Haynes, London.

*Simpson on the Law of Infants.* Second Edition. By Edgar J. Elgood, B.C.L., M.A. Stevens and Haynes, London.

*A Compendium of the Law of Property in Land.* Second Edition. By William Douglas Edwards, LL.B. Stevens and Haynes, London.

*The Law of Trading Companies.* Second Edition. By Robert Manson. William Clowes and Sons, Limited, London.

*Law Relating to Sale of Goods and Commercial Agency.* Second Edition. By Robert Campbell. Stevens and Haynes, London.

*The Institutes of Roman Law.* By Rudolph Sohm, translated by James Crawford Ledlie, B.C.L., M.A. Clarendon Press, Oxford.

*The Elements of Jurisprudence.* By Thomas Erskine Holland, D.C.L. Fifth Edition. Clarendon Press, Oxford.

## Reviews.

*Principles of the Common Law.* By JOHN INDERMAUR, Solicitor. Seventh Edition. London: Stevens and Haynes. 1895.

It is four years since the author of this work brought out his last edition, since which time the Sale of Goods Act, 1893, 56 & 57 Vict., c. 71, has made some important changes in the law of sale and purchase. So too the Married Women's Property Act, 1893, and the Gaming Act, 1892. The book does not pretend to be more than an elementary work for beginners, and for this purpose it is admirably adapted. We cannot, however, say as much of its value for the actual practitioner; for instance, we are told at p. 163, on the authority of Coke upon Littleton, 214 *a*, that *choses in action* could not formerly be assigned; whereas the reference in Coke is quite foreign to the subject, which makes us suspect that the author has been guilty of using a second-hand reference. The book is well printed, and copious marginal notes tend considerably to increase its value. The author expresses his thanks to his colleague, Mr. Charles Thwaites, for assistance, and in every respect the work may be considered, by students, as quite up to date.

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*The Law of Building, Engineering, and Shipbuilding Contracts.* By ALFRED A. HUDSON, of the Inner Temple, Barrister-at-Law. Second Edition in Two Vols. London: Waterlow & Sons, Ltd., and Stevens & Haynes. 1895.

The first edition of this work was published by the author in 1891, with the assistance of Mr. Geary and of Mr. W. F. Craies. So good was that edition that we are pleased to notice that Mr. W. F. Craies again appears as the *fidus Achates* of the author. It is a peculiar feature of this work that the author has gained a technical knowledge of building as an architect, and one mind therefore is able to unite the legal and operative rules in laying down principles. The first volume contains full information as to the peculiarity of building contracts, and as to the position of the builder, proceeding to deal with the authority of architects and engineers, their

duties and liabilities, their charges, quantity surveyors and bills of quantities, tenders and contracts generally, approval and certificates, performance, extras, vesting of materials, lien and forfeiture, assignments of contracts, guarantee and sureties, arbitration and reward. In the second volume some 36 cases cognate to the subject before us, and which have occupied the attention of the English and Irish Courts, are duly reported at length; also a valuable list of the statutes relating to buildings, as well as some conveniently drawn precedents of contract. Scales of professional charges of architects and surveyors of Great Britain, America, New South Wales, as well as Ryde's scale, complete a useful, well considered, and well digested work on the subject proposed by the author. It is bound to hold its place as a leading text-book for many years to come.

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*Taylor's Treatise on the Law of Evidence as Administered in England and Ireland.* Ninth Edition. In Two Volumes. By G. PITT-LEWIS, Q.C., sometime holder of the Studentship of the Four Inns of Court, Recorder of Poole. London: Sweet and Maxwell, Ltd. 1895.

The first edition of this work was published in 1848, and curiously enough forty-eight years ago. Whether there be any magic in numbers, we leave for others to say, but with the skill of an artful magician, Mr. Pitt-Lewis has waived his wand and presented the Profession with a capable and erudite work evolved from the chaos of the preceding editions. He tells us in his Preface, that his edition has been reduced by nearly one-fourth of the bulk of the preceding edition, but even after this excision the volumes are tolerably bulky. In the Table of Cases the learned editor has, at a great expenditure of labour, furnished references to every Report of each case which can be ascertained to exist on the subject; he also gives us some American decisions, as well as the principal Irish decisions, which, although entitled to much respect, are not binding on English judges, as was pointed out by Lord (then Mr.) Justice Kay in *re Parson*, 45 Ch.D. 62. It is a matter of regret, that the long proposed reform of the Law in criminal cases, of permitting accused persons and their wives or husbands, as the case may be, to give evidence in *all* cases, has not yet been achieved, since such an Act would materially depreciate the



value of the work before us, notwithstanding the suggestion of the editor that a supplement might alleviate the disturbance.

We confidently recommend the book as the best existing treatise on the Law of Evidence, a position which it has long maintained, and which the labours of the learned editor have certainly not tended to impair. We doubt if it be possible for any book to be perfect, and so it is an additional pleasure in dealing with a work like this one, to notice at p. 21 a fault of omission; the editor there tells us that the Courts have themselves sometimes made necessary enquiries, as for example, the Court of Common Pleas directed enquiry to be made as to the practice of the Enrolment office, and Lord Hardwicke once asked an eminent conveyancer respecting a general rule of practice in the latter's profession. But the editor has omitted to tell us, that, when a question of Civil Law arose in the Common Law Courts, it was the practice to desire the presence of one or more (but generally two) doctors of Civil Law, or advocates, to explain the question to the Court; this was commonly termed "to call in a pair of doctors." See *Greenway v. Barber* (Godbolt's R., p. 260).

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*A Digest of Anglo-Muhammadian Law.* By Sir ROLAND KNYVET WILSON, Bart., Barrister-at-Law. London: W. Thacker & Co. 1895.

*A Short Treatise on Hindu Law as Administered in the Courts of British India.* By HERBERT COWELL, of the Middle Temple, Barrister-at-Law. London: W. Thacker & Co. 1895.

*An Epitome of Hindu Law.* By CHHOTALAL KARSANDAS MULJI and F. A. RANA. Bombay. 1894.

We have here the latest emanations of some of the laws prevailing in our vast Indian Domain. Sir Roland Knyvet Wilson has added his literary offering to the "Introduction to the Study of Anglo-Muhammadian Law" which we reviewed in our issue of May last; it appears to be the result of his fourteen years' tenure of the Readership of Indian Law at the University of Cambridge. It deals with family relations, marriage and divorce, succession, wills, alienation, gifts, charitable and religious foundations, pre-emption, and the peculiarities of the Shafai school of Sunni Muhammadans on points within the sphere of Anglo-Muhammadian Law, the peculiarities of the

Shia Law, the Motazala Law, and contains appendices concerning maintenance orders, religious endowments, pre-emption in the Punjab and Oudh, and the Koranic bases of Anglo-Muhammadan Law. Side by side with this comprehensive treatise we find the equally erudite work of Mr. Cowell, who founds his book on Hindu Law, partly on his Tagore Law Lectures, 1870-71, and partly on lectures addressed by him to students of the Inns of Court about two years ago. He deals with the sources of Hindu Law, ownership, alienation, the widow's estate, wills, religious endowments, adoption, and inheritance. A perusal of the two works must give the patient student a very considerable insight into these Eastern lores, without wading through a large number of pages. In both works the law is clearly and concisely laid down. The writers of the *Epitome of Hindu Law* have compiled their little book from the writings of Mr. Cowell and from other English exponents of that law. Students may find it useful; it is very short.

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*The Law of Parent and Child, Guardian and Ward, and the Rights, Duties, and Liabilities of Infants.* By R. STORRY DEANS, of Gray's Inn, Barrister-at-Law. London: Reeves and Turner. 1895.

A short book of 128 pages and some appendices, offers the student an epitome of the law on the above subject. The law appears to be carefully digested, and although only a little book it bids fair to hold its own among text-books of a more ambitious character.

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*Der Staatsbankerott und die moderne Rechtswissenschaft.* By Dr. FR. MEILI, Professor des internationalen Privatrechts an der Universität Zürich, Advokat. Berlin. 1895.

This is really an expansion of, and commentary on, a resolution of the Faculty of Law of Zürich to the effect that it is necessary to take some measures, from the international standpoint, for the purpose of providing more efficient remedies for creditors of a foreign State. The full discussion of the subject, says the learned author, belongs to the "unpaid debts" of jurisprudence. Its importance is obvious, especially to Englishmen, with their not altogether pleasant memories of the results of financing certain small nations, chiefly with Spanish names. How much money goes, or has gone, in this unsatisfactory way may be

judged from the fact that the sum total of national debts has risen from about 500 million sterling in 1793 to about 5,000 millions in 1893. "States are jurally bound," says Professor Lorimer,\* "to co-operate with each other . . . in vindicating international honesty by the liquidation of debts, whether incurred by one State to another or by a State to the citizens of another State. The fact that individuals speculate in foreign funds merely with a view to their private gain, is no reason why the States which borrow from them should be permitted to lower the tone of international morality by swindling them with impunity." The wrong being admitted, the question of immediate importance is the remedy. The great difficulty is the immense difference of sanction in individual and in national insolvency. In the former, the State can, of course, coerce the defaulter; in the latter, the coercion can only be by a combination or organisation of States. Professor Meili suggests that the combination should be on the lines of the Egyptian Public Debt Commission, and should be composed of States occupying a judicial and independent position between the State complaining of repudiation of debt and the State alleged to have repudiated. This is a more juristically elegant process than intervention by the State injured on behalf of its own citizens, the form which up to now redress has generally taken.

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*Select Pleas in the Court of Admiralty.* Vol. I., A.D. 1390—1404, and A.D. 1527—1545. Edited for the Selden Society by REGINALD G. MARSDEN. London: Bernard Quaritch. 1894.

*Select Passages from the Works of Bracton and Azo.* Edited for the Selden Society by FREDERIC WILLIAM MAITLAND. London: Bernard Quaritch. 1895.

*The Mirror of Justices.* Edited for the Selden Society by WILLIAM JOSEPH WHITTAKER, with an introduction by FREDERIC WILLIAM MAITLAND. London: Bernard Quaritch. 1895.

The first of these volumes throws considerable light on the early history of the Admiralty. It appears that the title Admiral was not used in England before the beginning of the 14th century, the words "*capitaneus marinellorum*," or "Captain of the King's Mariners," or "Keeper of the Sea

\* Institutes of the Law of Nations, i., 447.

Coasts," were employed. The title "Admiral," originating in the East and adopted by the Genoese, came to England by way of Gascony. From very early times there had been in existence in some of the sea ports of England, Courts exercising Admiralty jurisdiction by virtue of a deputation from the High Court of Admiralty; Courts which afterwards multiplied, and which in counties were under the jurisdiction of Vice-Admirals of the Coast (a question very fully dealt with in a monograph published by Sir Sherston Baker, Bart., in 1884), while in boroughs they continued to exist until the passing of the Municipal Corporations Act, 1835. As early as 1383 we find, in the book before us, p. xlix., a local Court at Aldestowe, *i.e.*, Padstow, holding its sittings "*ad tidam quando aqua fluebat secundum legem et consuetudinem marinam.*" The defendant who made default of appearance was attached by his ship and her apparel. The trial was before the Mayor and Burgesses, assisted by a jury of mariners and merchants, and evidence was given by witnesses on oath, "according to the use and custom of the said Town, and according to the Maritime Law." In this particular case application was afterwards made to the Court of King's Bench to obtain execution of the judgment. But the object of this work is rather to show the proceedings in the High Court of Admiralty. There is a curious instance at p. lxxi. of some ships being forfeited to the Admiral as deodands in the 16th century; this being quite contrary to the usual law. It would take far more space than we can bestow to do justice to the merits of this very interesting book, which reflects great credit on its editor. We note a reproduction of a seal of the Court of Admiralty attached to a warrant of 1559; the facsimile is struck in a film of pure copper and inserted in the cover of the volume.

The second work for our consideration is a comparison between the most romanesque portions of Bracton's treatise with the text from which they are derived. Dr. Carl Güterbock suggested in 1862, that Bracton, although he occasionally referred to the Institutes, the Digest, and the Code, derived the greater portion of his material from the works of Azo of Bologna, a learned man who early in the 13th century stood at the head of the Bolognese School of Law, which was accomplishing the resuscitation of classical Roman jurisprudence. Azo's chief work is a Summa of the first nine books of the Code, to which he appended a Summa of the Institutes. Bracton,

sometimes Henry of Bratton or of Bretton, may in all probability be traced to one of two Devonshire villages—Bratton Clovelly or Bratton Fleming. He first comes before us as a Justice in Eyre, visiting Lincolnshire in 1245, and later he was hearing pleas *coram rege*. In 1259 he was instituted Rector of Combe in Teignhead, near Teignmouth; thenceforth he takes the Assizes of Devon and Cornwall. In 1261 he became Rector of Bideford, and in 1264 Archdeacon of Barnstaple. In 1267 he was a member of the Commission who heard the complaints of the disinherited partisans of Simon de Montfort. The learned editor shows us that the amount of matter that Bracton borrowed from Azo amounts in all to a fifteenth of the Treatise, while he undoubtedly borrowed, though sparingly, from the Corpus Juris. By means of an apposite arrangement of the two texts, we are able to study Bracton and Azo simultaneously, while many and learned notes of the Editor tend to enhance the value of this interesting work on jurisprudence.

The last of these works is, perhaps, the least interesting. Doubtless the learned editor has experienced considerable difficulty in elucidating a corrupt text, but he appears nevertheless to have done his work well, and further furnishes us with an excellent translation. The burden of the day has fallen on his shoulders; but it is the introduction of Professor Maitland, prefacing this work, which is the more interesting. He elaborates several conjectures concerning the treatise, beginning with the mistake into which Lord Coke fell, when he thought he had acquired a treatise which set forth the law of King Arthur's day, and which led to his Institutes being filled with tales from the *Mirror*; Professor Maitland tells us how Sir Francis Palgrave spoke out his mind against Andrew Horn being the author of the *Mirror*, and considered it worthy of rejection as any evidence concerning the early jurisprudence of Anglo-Saxon England. Whether Horn did or did not write the work, and who did write the work, is still a mystery; but it is clear that if the writer knew anything at all about the Law of the Anglo-Saxon or of the Norman time, he has kept the knowledge studiously to himself. Moreover, Professor Maitland accuses him of deliberately stating as law what he knew was not law. A dissertation concerning the meaning of five mysterious verses at the head of the treatise will also prove of interest to the reader, whom we must refer to the work itself for further information and considerable instruction.

*The Laws' Lumber Room.* By FRANCIS WATT. London: John Lane. Chicago: McClurg & Co. 1895.

This little book originally appeared as contributions to the *National Observer* under the Editorship of Mr. W. E. Henley, to which the present Editor, Mr. Francis Watt, has made some additions and corrections. For those lawyers, who are lawyers indeed, not mere *connoisseurs* of modern statutes and Judicature Rules, this work will be full of interest. It is but little known save by the man who has read deeply into ancient lore, how much indebted modern principles of law are to the former procedures, nay to the very fictions of the Common Law, for their being. The present work contains essays on benefit of clergy, the custom of the manor, deodands, sanctuary, ordeal, press-gang, sumptuary laws, and many others. It is a mistake that copious references are not given; these would have made the book valuable indeed.

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*Penological and Preventive Principles with Special Reference to Europe and America.* By WILLIAM TALLACK, Secretary of the Howard Association. Second Edition. London: Wertheimer, Lea & Co. 1896.

The Committee of the Howard Association have issued the second edition of this book, revised to date. We notice new chapters on sentences, capital punishment, pauperism, intemperance, prostitution, and social crimes. It is full of interest for those who have at heart the reclamation of the criminal classes.

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*Restraints on the Alienation of Property.* By JOHN CHIPMAN GRAY, LL.D., Royall Professor in Harvard University. Second Edition. Boston: The Boston Book Company. 1895.

A useful book which in some 300 pages discusses the question of forfeiture for alienation, and restraint on alienation. It is interesting to us to notice how the principles of our law have obtained in the new country, subject of course to local variations and modifications. The work is brought up to date, and is of a thoroughly reliable character.

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*Einleitung in eine Entwicklungsgeschichte des Rechts.* By Dr. ERNST NEUKAMP. Amtsgericht in Göttingen. Berlin. 1895.

This is the introductory volume to a series in which the learned writer, a follower of the "Allgemeine Rechtslehre"

School, proposes to complete his history of the development of Law. It is a vast subject, and he can hardly wonder that it has hitherto been treated on a smaller scale than its importance warrants. Von Ihering, for instance, proceeded inductively, but based his induction almost entirely on Roman Law. This, Dr. Neukamp considers, made the induction too narrow, and it is necessary to broaden it by the skilful use of the materials which are being continually augmented by the comparative study of Law. Dr. Neukamp is very anxious that it should be admitted that Law is a science, and that it is heresy with Schlopman and others to call it an art. The heresy is, however, one of ancient growth. Roman texts admitted *ars boni et æqui* as well as *justi atque injusti scientia*. Cicero is said to have written a work *De Jure Civili in Artem Redigendo*. In the Visigothic Code *lex* is stated to be *artifex juris boni*. And some of the Hindu law-books take a not dissimilar view.

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*Phillimore's Commentaries upon International Law ; Private International Law or Comity*. Vol. IV. Third Edition. By Sir W. G. F. PHILLIMORE, Bart., D.C.L., of All Souls College, Oxford, and of the Middle Temple, Barrister-at-Law, and R. J. MURE, M.A., of Christ Church, Oxford, and Lincoln's Inn, Barrister-at-Law. London : Butterworths.

The three preceding volumes of this edition were prepared by the author, the late Sir Robert Phillimore, Judge of the High Court of Admiralty. He had collected some materials for this volume, but the task of casting it into shape has fallen upon his son, the present editor. The additions to the original work are enclosed in square brackets, and consist of new laws, treaties, judicial decisions, additional illustrations from the foreign codes and corrections needed from the alteration of the English judicial system and procedure under the Judicature Acts, Acts relating to married women, and bills of exchange. The volume is devoted to the consideration of what the writer terms *Private International Law*, a nomenclature which has earned for itself the following criticism of Professor Holland : " It is most important for the clear understanding of the real character of the topic which, for the last forty years, has been misdescribed as *Private International Law*, that this barbarous compound should no longer

be employed." The work deals with all those subjects which generally fall under the term *Conflict of Law*, such as Origo, Domicil, *Jus personarum*, Statutes, Marriage, Divorce, Paternal Rights, Guardianship, *Jura Incorporalia*, Obligations, *Lex Mercatoria*, Bills of Exchange, Succession and Foreign Judgments. The work is one of great repute, and we unhesitatingly give it as our deliberate opinion that the learned editor has sustained the position and authority of the work before us.

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*Service out of the Jurisdiction.* By FRANCIS TAYLOR PIGGOTT, M.A., of the Middle Temple, Barrister-at-Law. London: W. Clowes and Sons, Limited.

The introduction of the practice of service out of the jurisdiction involved an important change in the law. Such change, it would appear, can only be effected by Parliament. In the Common Law Procedure Act, 1852, the subject was expressly dealt with, but all reference to it has been omitted in the Judicature Acts. The practice now depends entirely on the Orders and Rules of Court. In such a strange position, and so to speak, between the two horns of a dilemma, it is most useful to a practitioner to have a well digested and explanatory work on this difficult subject. This we think Mr. Piggott has succeeded in doing, and we can recommend the work to our readers.

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*The Law of Torts.* By J. F. CLERK, of the Inner Temple, Barrister-at-Law, and W. H. B. LINDSELL, of Lincoln's Inn, Barrister-at-Law. London: Sweet and Maxwell, Limited.

We really doubt whether since the admirable edition of *Addison on Torts*, by the Hon. Sir Lewis Cave (then Mr. Cave), any room has been left for a new work on the subject. The ambitious authors of the work before us, however, appear to think differently, and have succeeded in laying before the public a large work of some 630 pages. All the subjects which appertain to this class of work seem to have been adequately dealt with, and we commend the writers' industry and labour, although they must not consider that they have succeeded in disturbing the position of their well-known and successful rival.



*The Principles of International Law.* By T. J. LAWRENCE, M.A., LL.D., Rector of Girton, and Lecturer in Downing College, Cambridge. London: Macmillan and Co. 1895.

The Rev. Mr. Lawrence is already known to the legal profession by his handbook of *Public International Law*, which useful little work seems to have expanded into the more ambitious work before us. International Law has already been so thoroughly enunciated by the great publicists of the present day, that little, if anything, remains to be added. The author admits that the writer of every new work on International Law is the debtor of all who have gone before him in his particular sphere, and this treatise can boast of no more than of being a compilation from larger works; but it is a good compilation and evinces considerable pains and care. We should have been better pleased, however, if he had gone to the fountain head for his information, as he leads the reader sometimes into mistakes. For instance, had he used the third edition of Sir Sherston Baker's *Halleck*, instead of the second, he would have given the right page of the case of John Brown and the opinion of Lord Stowell on it, as being at page 228 instead of 188; and in a similar way he would have avoided the mistake which he makes at page 231 of his work in ascribing the authority of Consular Courts in other countries as being derived from the Foreign Jurisdiction Act of 1843, whereas that Act was repealed in 1890 by the Foreign Jurisdiction Act, 1890, 53 and 54 Vict., c. 37.

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*The Revised Reports: being a Republication of such Cases in the English Courts of Common Law and Equity, from the year 1785, as are still of practical utility.* Edited by Sir FREDERICK POLLOCK, Bart., LL.D., Corpus Professor of Jurisprudence in the University of Oxford; assisted by R. CAMPBELL, Esq., of Lincoln's Inn, and O. A. SAUNDERS, Esq., of the Inner Temple, Barristers-at-Law. Vol. I., 1785—90. London: Sweet and Maxwell, Limited. 1891.

The "Revised Reports," as they are termed, here make their *début*. The idea appears to be not to reprint those cases which the editors deem important or instructive, but to omit such cases and parts of cases as appear to them to be not important for the current study and practice of the law. This volume deals with the first volumes of Cox and Vesey, jun., and the

three first volumes of Durnford and East's Term Reports. It is difficult to discover, by mere perusal, whether the work has been adequately well done. It requires to use the volume, and the ordinary practitioner finds it more convenient to refer to his own familiar editions of these Reports than to *excerpta*, however well they may be done. Probably, if in course of time the work is found to be reliable, it will become of much service to barristers travelling on circuit, as well as to the poorer members of the profession who stay in town; but the future must pronounce its verdict.

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*The Law relating to the Sale of Goods and Commercial Agency.* By ROBERT CAMPBELL, M.A., of Lincoln's-Inn, Barrister-at-Law. Second Edition. London: Stevens and Haynes. \*

A useful compendium on that portion of mercantile law relating to the sale of goods. The subject is elaborately dealt with in something over 700 large pages, and the author has bestowed much pains on the work. Seeing, however, that the Sale of Goods Act, 1893, has effected divers alterations in the law on the above subject, it is necessary for the reader to collate the book with this Act, or he is liable to be led astray.

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*The Law of Trading and other Companies formed or registered under the Companies Act, 1862.* By EDWARD MANSON, of the Middle Temple, Barrister-at-Law. London: Wm. Clowes & Son, Ltd.

The aim of the author appears to have been to methodize the heterogeneous and confused mass of Company Law, and to digest it as far as practicable. This important branch of law is dispersed through 16 Acts of Parliament, several Tables of Statutory Regulations, a General Order and Forms, two sets of Winding-up Rules and Forms, Board of Trade Regulations, isolated sections from the Bankruptcy Act, the Judicature Act, the Married Women's Property Act, 1882, selections from the Law of Partnership and Agency, and some 3,000 to 4,000 decisions not always harmonious. The learned author has made his work alphabetical, and any question on the Law of Trading Companies can be referred to at a moment's notice. The hard-worked practitioner will find it invaluable. We should add that

a note on "Founders' Shares" and another on the "Waiver Clause," in prospectuses, will be found useful.

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*A Compendium on the Law of Property in Land.* By W. D. EDWARDS, LL.B., of Lincoln's Inn, Barrister-at-Law. Second Edition. London: Stevens and Haynes.

The first edition of this work was published in 1888, and we are glad to find that the favourable reception given to the author has encouraged him to edit a second edition, which appears to be well considered on the whole. The foundations of a work of this description are naturally common property; it is rather the combination and arrangement for which an author is responsible. The book may be relied on with confidence by the student; it is well written, and the leading principles are successfully enunciated. The fact of the book having entered on its second edition is *prima facie* evidence in its favour.

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*Hardcastle's Treatise on the Construction and Effect of Statute Law.* Second Edition, revised and enlarged. By W. F. CRAIES, M.A., of the Inner Temple, Barrister-at-Law. London: Stevens and Haynes.

A well known work of repute like good wine "requires no bush." It is when the volume falls into the hands of an editor for a second or other edition that doubts may be aroused. In this case the editor has followed the method and arrangement of the first edition, but has been obliged to make considerable additions and alterations in order to bring the book up to date. The Interpretation Act, 1889, did much to simplify the language and facilitate the interpretation of Statutes; but its practical and far-reaching effect is not yet fully realized. The Editor endeavours to shew how far that Act alters or adopts pre-existing rules of construction and deals with the effect of Consolidation and Revision Acts. "The word *Statute* in English law has always meant an Act of Parliament," says the author; "it is used in contradistinction to the *Common Law* and to *ordinance*." The effect and operation of statutes are clearly set forth, and the work concludes with some useful learning on Penal Acts and also on the nature, construction and effect of Private Acts. It is unquestionably a reliable and erudite work.

*Simpson's Treatise on the Law and Practice relating to Infants.* Second Edition. Edited by EDGAR J. ELGOOD, B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law. London: Stevens and Haynes.

The questions concerning the guardianship of infants are manifold, and Mr. Simpson's book, when it was published in 1875, was soon received by the profession as a leading authority upon the law of infants. But since that time the Conveyancing and Law of Property Act, 1881, the Married Women's Property Acts, the Settled Land Acts, and the Guardianship of Infants Act, together with the large amount of new decisions, have rendered it imperative that a new edition should be produced for the legal practitioner. Mr. Elgood has, to the best of his ability, stated the modern law on the subject of this book without, in all cases, entering so fully into the older law as Mr. Simpson thought it desirable to do. It is interesting to note at this moment, when a discussion is raging as to the power of magistrates to investigate an indictable offence with closed doors, that Mr. Elgood tells us, p. 501, that, where wards of court are concerned, the Courts of the Chancery Division will exercise discretion as to hearing a cause in private whether the other party consent or no.

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*The Life of Sir James FitzJames Stephen, Bart., K.C.S.I., a Judge of the High Court of Justice.* By his brother, LESLIE STEPHEN. London: Smith, Elder & Co. 1895.

For those who wish to have the full history of a judge from the cradle to the grave, and not only that, but an historical digest of his progenitors, we can recommend no better work than the book before us, written as it is by the loving hand of a brother, and compiled by one who had abundant opportunity of being acquainted with the minutest details of the life of the late judge. True it is that the writer of the biography is not a lawyer, and is therefore unable fully to appreciate an estimate of his brother's labours in the forensic field; but, as he tells us, he is writing of the man himself, of one in whose character and fortunes he took the strongest interest. The work leads us step by step from the family history of Sir James F. Stephen through his early life, his career at Eton, King's College, and Cambridge, his reading for the Bar, his connection with journalism, his

official life in India, and lastly, his appointment to a judgeship of the High Court of Justice. His legal works are too well known to require reference to here; but those lawyers who make use of them will be much interested by a perusal of the volume before us.

*The Institutes of Roman Law.* By RUDOLPH SOHM, Professor in the University of Leipzig, translated by J. C. LEDLIE, of the Middle Temple, Barrister-at-Law. Oxford, at the Clarendon Press.

*The Elements of Jurisprudence.* By THOMAS ERSKINE HOLLAND, D.C.L., of Lincoln's Inn, Barrister-at-Law, Chichele Professor of International Law and Diplomacy. Fifth Edition. Oxford, at the Clarendon Press.

*The Roman Law of Sale, with Modern Illustrations.* Digest xviii., 1, and xix., 1. Translated by JAMES MACKINTOSH, B.A., Advocate. Edinburgh: T. and T. Clark.

*The Elements of Roman Law Summarized. A Concise Digest of the Matter contained in the Institutes of Gaius and Justinian.* By SEYMOUR F. HARRIS, B.C.L., M.A. Second Edition. London: Stevens and Haynes.

The text of the *Corpus Juris Civilis* became the object of the exegesis of jurists when the study of Roman Law was revived in Italy at the beginning of the 12th century. Authority was firmly believed in, in the Middle Ages, and under this influence the jurists of that period thought themselves absolutely bound by the contents of the *Corpus Juris Civilis*, forgetting that their own time was separated by a development of more than 500 years from the period of the codification of Justinian. Roman Law was definitely received in Germany in the course of the 16th century, and has become an ingredient in the German Law; even where the formal validity of the *Corpus Juris Civilis* has been expressly set aside, the force of Roman principles has remained substantially unimpaired within large departments of German jurisprudence.

In England, the Roman Law has made itself felt, though far less distinctly than in Germany. Of late years there have been signs of a revival of the study of Roman Law, partly owing to a growing familiarity with continental life and literature, partly owing to the writings of Sir H. Maine, Bentham and Austin.

The works before us are all founded on Roman jurisprudence, the first, third, and fourth pointedly so, the second inferentially so. The first is an able translation from the work of Professor Sohm, whose name is in itself evidence of an erudite and trustworthy manual. The second, the work of Professor Holland, has attained its fifth edition, and has been thoroughly revised; it will be found, in many respects, a considerable improvement upon its predecessors. The third work reminds us that the Civil Law has become a dominant factor in Scotland, and deals with the principles of the Law of Sale as stated in the Titles *De Contrahenda Emptione* and *De Actionibus Empti Venditi*. Unfortunately the compilers of the Digest, in the hasty execution of their task, threw together the materials that lay to their hand without sufficient regard to subject or to orderly arrangement; Mr. Mackintosh has, therefore, had a difficult work in his attempt to compare the English Common Law with the Roman Civil Law.

Mr. Harris contents himself with summarizing the matter contained in the best known portion of the Roman Law, and has made a useful little book, and one well adapted for students, whether of the Inns of Court or of the Universities. Students should begin with his guidance before ascending the lofty ridges of Holland or Sohm.

*The Law and Practice on Enfranchisements and Commutations.* By ARCHIBALD BROWN, of the Middle Temple, Barrister-at-Law. London: Butterworths.

*The Law and Practice under the Settled Land Acts, 1882 to 1890.* By AUBREY ST. JOHN CLERKE, of the Middle Temple, Barrister-at-Law. Second Edition. London: Sweet and Maxwell, Limited.

Two little manuals which deal with land. The former deals with the earlier Copyhold Acts and also with Enfranchisements and Commutations at the Common Law, while practical directions for the conduct of Enfranchisements and Commutations are given. Various precedents of Enfranchisements, and of documents incidental thereto, will be found to be not the least useful portion of this concisely written work.

No statute of modern times has effected a more sweeping change in the Land Laws of England than the Settled Land

Act of 1882—a change which has been described as amounting to a revolution. Whether the innovations introduced by this statute are a revolution or a reform, it certainly has been welcomed, and will undoubtedly be utilized by numbers of distressed landowners. The Editor in preparing this edition appears to have taken every care to avoid the omission of any reported case decided under the Act, or bearing, however remotely, on the construction of any of its sections.

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Among periodicals we notice: *The University Law Review*, of New York; *The American Law Review*, of St. Louis, Mo.; *The Chicago Legal News*; *The State Library Bulletin*, of Albany; *The Law Book News*, of St. Paul, Minn.; *The Toledo Legal News*, of Toledo, O.; *The National Corporation Reporter*, of Chicago; *The Virginia Law Journal*; *The Canadian Law Times*; *The Western Law Times*, of Canada; *The Madras Law Journal*; *The Law Times*, London; *The Law Journal*, London; *Bulletin Mensuel de la Société de Législation Comparée*; *Annuaire de Législation Française*; *Annuaire de Législation Etrangère*, Paris; *La Revue Générale*; *Revue Bibliographique Belge*; *Case and Comment*, Rochester, N.Y.; *Report from the Local Government and Taxation Committee of the London Chamber of Arbitration*; *Notas sueltas sobre la pena de muerte*, by Q. Newman, Santiago de Chile.

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# Quarterly Digest:

BY

C. H. LOMAX, M.A., OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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# Quarterly Digest

OF

## ALL REPORTED CASES,

IN THE

### Law Reports, Law Journal Reports

FOR NOVEMBER AND DECEMBER, 1895, AND JANUARY, 1896,  
AND IN THE Law Times, and Weekly Reporter  
FOR OCTOBER, NOVEMBER, AND DECEMBER, 1895.

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Barrister-at-Law.

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#### Administration:—

- (i.) **P. D.—Bond—Foreign Sureties.**—Where the deceased, who was domiciled abroad, has left debts in England, an application for leave to give an administration bond with foreign sureties should be made to a Judge at Chambers.—*In the goods of Scott*, L.R. [1895] P. 342; 73 L.T. 317.
- (ii.) **Ch. D.—Costs.**—Where the costs of administration are increased by the administration of real estate, such increased costs must be borne by the real estate.—*Mitchell v. Bain*, 44 W.R. 94.
- (iii.) **P. D.—Grant to Creditor—Citation—Notice.**—In granting administration of a small estate to a creditor, the Court dispensed with the citation of the next-of-kin, on proof that they had notice of the application.—*In the goods of Teece*, L.R. [1896] P. 6.
- (iv.) **Ch. D.—Gift of Reversionary Interests—Power to Convert at Discretion—Right of Tenant-for-Life.**—Where a testator bequeaths a reversionary interest vested in him upon trust for a tenant-for-life and remaindermen, with power to the trustees of the will to sell if and when they think fit, an intention is shewn that it should not be converted at his death, and the tenant for life is not entitled to be paid anything out of the proceeds when the interest falls into possession, in respect of the postponement of the conversion.—*Brandreth v. Colvin*, 73 L.T. 430.
- (v.) **P. D.—Partly Administered Estate—Bond.**—Where application was made for a grant after an estate had been partly administered, the Court allowed a bond to be given in double the amount of the unadministered estate.—*In the goods of Oakey*, L.R. [1896] P. 7.

- (i.) **Ch. D.—Retainer—Right of—Annuity.**—An administrator, entitled to an annuity under a covenant by the intestate, whose estate is insolvent, is entitled to retain all arrears of the annuity falling due during the administration, but only to prove for the value of the future annuity.—*Fowler v. James*, L.R. [1896] 1 Ch. 48.
- (ii.) **Ch. D.—Tenant for Life and Remainderman—Capital and Income—Mortgage Interest.**—A testator being entitled to policies on the life of B. subject to a mortgage, bequeathed his residue upon trust for conversion, and directed the proceeds to be held upon trust for certain persons for life and then over. The executor did not sell the policies, but paid the premiums and the mortgage interest out of the estate. The policies having fallen in, *held*, that the yearly sums expended in payment of premiums and interest ought to be recouped to the tenants-for-life with interest at 4 per cent., and the balance apportioned between capital and income.—*Morley v. Haig*, L.R. [1895] 2 Ch. 738; 64 L.J. Ch. 727; 73 L.T. 151; 44 W.R. 140.
- (iii.) **P. D.—Will Annexed—Executrix a Pauper Lunatic.**—The sole executrix and residuary legatee, being also one of the next-of-kin, of a testatrix, did not prove, and became chargeable as a pauper lunatic, not so found. The Court required the other next-of-kin to be cited, and when they did not appear, granted administration with the will annexed to a nominee of the guardians of the union for the use and benefit of the lunatic, limited to the duration of her lunacy.—*In the goods of Hockin*, 73 L.T. 316.

#### Adulteration :—

- (iv.) **Q. B. D.—Margarine—Use in Refreshment Room—Margarine Act, 1887, s. 6.**—The use of margarine in a refreshment room as a condiment with the articles of food sold there to be consumed on the premises is not a sale by retail within the section.—*Moore v. Pearce's Dining and Refreshment Rooms*, L.R. [1895] 2 Q.B. 657; 65 L.J. M.C. 7; 73 L.T. 400; 44 W.R. 94.
- (v.) **Q. B. D.—Margarine—Purchaser in Borough—Jurisdiction—Time for Service of Summons—Notification to Seller—Margarine Act, 1887, ss. 6, 7, 12—Sale of Food and Drugs Acts, 1875, s. 14; 1879, s. 10.**—Where margarine sold without a proper mark is delivered to a purchaser within a borough not having a separate court of quarter sessions, the county justices have jurisdiction to deal with the case. The justices having found that the margarine was not perishable, *held*, that the summons need not be served within twenty-eight days of the purchase. The margarine not having been purchased for test purposes, *held*, that the intention to have an analysis need not be notified to the seller.—*Buckler v. Wilson*, L.R. [1896] 1 Q.B. 83.
- (vi.) **Q. B. D.—Margarine—Sale by Retail—Paper Wrapper—Margarine Act, 1887, s. 6.**—B. sold margarine by retail in cardboard boxes with a ribbon of paper round each box. On the ribbon and box was stamped "Margarine" in large letters. When the appellant bought some margarine B. delivered the box to him in an unstamped paper cover, but it was not clear whether the cover was put on at the appellant's request or not. *Held*, that B. could not be convicted of selling margarine without a paper wrapping stamped "Margarine" contrary to the Act.—*Toler v. Bishop*, 65 L.J. M.C. 1; 73 L.T. 403.
- vii.) **Q. B. D.—Sale of Food and Drugs Act, 1875, ss. 6, 8—Prejudice of Purchaser—Indication of Mixture.**—An agent of the inspector under the Act entered a shop and asked to be supplied with two pounds of cheese, pointing to an article labelled "Valleyfield Finest Oldine Cheese." The words "Finest Oleine" were in smaller type than the

other words. He received and paid for his purchase. The inspector then entered and notified that he intended to have an analysis. No label was given to the purchaser stating that the article was a mixture. The analysis showed that the article contained 70 per cent. of fat other than milk fat. *Held*, that the magistrate was right in deciding that there was not sufficient indication of mixture, and that the purchaser was supplied to his prejudice with an article not of the nature demanded.—*Collett v. Walker*, 64 L.J. M.C. 267.

**Arbitration :—**

- (i.) **C. A.—Costs of Reference—Umpire's Fees—Taxation—Lands Clauses Acts, 1845, ss. 34, 35; 1869, s. 1.**—Decision of Ch. D. (*see* Vol. 21, p. 1, iv.) affirmed.—*Earl of Shrewsbury v. Wirral Railway Co.*, L.R. [1895] 3 Ch. 812; 64 L.J. Ch. 850; 73 L.T. 234; 44 W.R. 19.
- (ii.) **Ch. D.—Partnership—Dissolution—Action for—Arbitration Clause.**—Where partnership articles provide for the reference of all matters in difference to arbitration, a claim for dissolution of partnership may be dealt with by the arbitrator, and therefore the judge may in the exercise of his discretion order a stay of proceedings in an action for dissolution.—*Vawdrey v. Simpson*, 44 W.R. 123.

**Bankruptcy :—**

- (iii.) **Q. B. D.—Annulment—Money paid into Court to meet Debts—Creditors not forthcoming.**—A debtor having paid all his creditors in full except two, who could not be found, and having paid into Court money to meet the claims of these two, obtained an annulment of the receiving order. No claim was made to the money in Court. Six years after the debtor applied that it might be paid out to him. *Held*, that the money belonged to the creditors, and that they were not barred by the Statute of Limitations. But that if the Court were satisfied that there was no chance of the creditors claiming, the official receiver would be ordered to pay the money out to the debtor on his giving security to replace it if claimed.—*E. p. Dennis; in re Dennis*, L.R. [1895] 2 Q.B. 630; 65 L.J. Q.B. 48; 73 L.T. 413.
- (iv.) **C. A.—Committee of Inspection—Profit by Member of—Solicitor—Sanction of Court—Bankruptcy Rules, 1886, r. 317.**—A solicitor, a member of the committee of inspection of a bankrupt's estate, did work as agent of the trustee's solicitor without having obtained the sanction of the Court. *Held*, that the sanction could not be given afterwards, and that the solicitor could not derive any profit. *Held*, also, that the whole of a solicitor's bill, except disbursements, is "profit," and that nothing could be allowed in respect of office expenses.—*E. p. Gallard; in re Gallard*, L.R. [1896] 1 Q.B. 68; 73 L.T. 457; 44 W.R. 121.
- (v.) **Q. B. D.—Landlord and Tenant—Distress—Rent due before Adjudication—Bankruptcy Act, 1883, s. 42 (1).**—A landlord let premises at £200 a year, but agreed to take £100 a year for the first two years, and £250 a year for the next two years. The tenant became bankrupt before the end of the first two years. *Held*, that the landlord could distrain for rent due at the rate of £200 a year, for the agreement had not altered the amount of the rent, but only the mode of payment, and could not have been enforced by the tenant if in default of payment.—*Official Receiver v. Legerson*, 44 W.R. 79.
- (vi.) **Q. B. D.—Liquidation by Arrangement—Trustee—Account—Power of Board of Trade—Bankruptcy Act, 1883, s. 162.**—The Board of Trade may require a trustee under a liquidation by arrangement under the



Act of 1869 to furnish an account of the sums received and paid by him as such trustee, without proving that he has in his hands since the Act of 1869 any money which he was empowered to collect, receive, or distribute.—*E. p. Board of Trade; in re Cornish*, L.R. [1895] 2 Q.B. 634; 73 L.T. 478.

- (i.) **Q. B. D.**—*Notice—Amount—Bankruptcy Act, 1883, s. 4 (g).*—A creditor may not, in a bankruptcy notice, demand more than the amount for which he can issue execution. Where execution has been levied on a judgment, a bankruptcy notice based on the same judgment cannot be issued until a return has been made to the writ of execution.—*E. p. Follows; in re Follows*, L.R. [1895] 2 Q.B. 521; 65 L.J. Q.B. 15; 73 L.T. 222.
- (ii.) **C. A.**—*Notice—Form—Address of Creditor.*—A bankruptcy notice must contain an address of the creditor at which the debtor can pay, or secure, or compound for, the debt. Therefore where a notice gave as the creditor's address a club, and the creditor was out of England at the service of the notice, and for seven days after: *Held*, that the notice was bad.—*E. p. Leigh; in re Stogdon*, L.R. [1895] 2 Q.B. 534; 65 L.J. Q.B. 47; 73 L.T. 279.
- (iii.) **Q. B. D.**—*Hearing of Petition—Attendance of Petitioning Creditor.*—The attendance of the petitioning creditor is necessary at the hearing of a petition, unless the Court think fit to dispense with it.—*E. p. Purrett; in re Purrett*, 73 L.T. 224.
- (iv.) **C. A.**—*Petition—Petitioning Creditor—Judgment due to Three—Death of One—Petition by Survivors.*—Where three co-plaintiffs have obtained a judgment, and one has died, the survivors may present a bankruptcy petition against the debtor in respect of the judgment debt, without joining the legal personal representative of the deceased judgment creditor.—*In re Tucker; e. p. Tucker*, 73 L.T. 170.
- (v.) **C. A.**—*Plaintiff made Bankrupt—Discontinuance of Action by Trustee—Assignment of Interest—Fresh Action.*—Decision of Ch. D. (see Vol. 21, p. 3, iii.) reversed. *Held*, that the question whether the order staying proceedings in the former action was equivalent to a judgment for the defendant was one which ought to be considered.—*Bean v. Flower*, 73 L.T. 371.
- (vi.) **Q. B. D.**—*Practice—Taxation of Costs—Right of Official Receiver to be Present.*—The official receiver has no right to be present, or to be heard, at the taxation of the bill of costs of the solicitor to the trustee or any other party; but the Court may order him to attend at the taxation, not as a litigant party, but to assist the taxing officer, or to enable him to report efficiently if the Board of Trade should require a review of the taxation.—*E. p. Crofton; in re Nash*, L.R. [1896] 1 Q.B. 18; 73 L.T. 477; 44 W.R. 112.
- (vii.) **Q. B. D.**—*Protected Transaction—Notice of Act of Bankruptcy.*—Knowledge by a creditor that a debtor's solicitor has instructions to prepare a notice that the debtor intends to suspend payment is not notice to such creditor that an act of bankruptcy has been committed, and consequently an assignment of a debt taken by such creditor from the debtor is valid.—*E. p. Turner; in re Morgan*, 73 L.T. 448; 44 W.R. 96.
- (viii.) **Q. B. D.**—*Sale of Goods of Debtor by Auctioneer—Lien—Credit—Bankruptcy Act, 1883, s. 38—"Mutual Dealings."*—L. instructed auctioneers to sell property, and money became due to them for their charges. He afterwards delivered to them goods as bailees, with authority to sell them. *Held*, that the credit given by each party

to the other constituted "mutual dealings" within the section mentioned.—*Palmer v. Day*, L.R. [1895] 2 Q.B. 618; 64 L.J. Q.B. 807; 44 W.R. 14.

- (i.) **Q. B. D.**—*Trustee—Appointment of—Objection to.*—The selection of a trustee of a deed of assignment for the benefit of creditors to be trustee in the bankruptcy of the assignor may be objected to by the Board of Trade, as his position is likely to make him other than impartial, being a trustee of the deed accountable to himself as trustee in the bankruptcy.—*E. p. Board of Trade; in re Mardon*, 73 L.T. 480; 44 W.R. 111.
- (ii.) **C. A.**—*Voluntary Settlement—Avoidance of.*—A voluntary settlement which is avoided as against the trustee, is avoided for all purposes, and is as if it had never existed; and the property comprised therein passes to the trustee as the property of the settlor, and not as the property of the beneficiaries under the settlement.—*In re Farnham*, L.R. [1895] 3 Ch. 799; 64 L.J. Ch. 717.

### Bill of Exchange:—

- (iii.) **Q. B. D.**—*Forged Indorsements—Acceptance and Payment—Mistake of Fact—Rights to Recover Back.*—Where the drawee of a bill of exchange accepts and pays the bill under the belief that certain indorsements thereon are genuine, which are in fact forged, the payment being made to a *bonâ fide* holder for value, he cannot afterwards, if such an interval has elapsed that the position of the holder may have been altered, recover back his money as having been paid under a mistake of fact.—*London and River Plate Bank v. Bank of Liverpool*, L.R. [1896] 1 Q.B. 7; 73 L.T. 473.
- (iv.) **C. A.**—*Cheque—Obtained by Fraud—Non-existing Payee—Forgery—Holder in Due Course—Bills of Exchange Act, 1882, s. 7, sub-s. 3.*—Decision of **Q. B. D.** (see Vol. 21, p. 3, v.) affirmed.—*Clutton v. Attenborough*, L.R. [1895] 2 Q.B. 707; 73 L.T. 496; 44 W.R. 114.

### Bill of Sale:—

- (v.) **C. A.**—*Defeasance or Condition—Instalments of Principal and Interest—Statutory Form.*—A bill of sale was given to secure the repayment of a loan by monthly instalments of £6 "on account of principal and interest." After the execution of the bill of sale the lender gave the borrower a book for entry of receipts of instalments, containing rules imposing conditions not in the bill of sale. *Held*, that these rules formed no part of the contract, and were not a defeasance or condition not expressed in the bill, which was therefore not avoided thereby. *Held*, also, that the stipulation for repayment by instalments of principal and interest was not such a deviation from the statutory form as to avoid the bill.—*Linfoot v. Pockett*, L.R. [1895] 3 Ch. 835; 64 L.J. Ch. 752; 73 L.T. 197; 44 W.R. 67.
- (vi.) **Ch. D.**—*Industrial and Provident Societies—Bill of Sale—Bills of Sale Acts, 1854, 1878, 1882, s. 17.*—A society registered under the Industrial and Provident Societies Act, 1862, is not an "incorporated company" within sect. 17 of the Act of 1882, and its debentures are not exempt from registration as bills of sale.—*G.N.R. v. Coal Co-operative Society*, 73 L.T. 448.

### Building Society:—

- (vii.) **Ch. D.**—*Withdrawal of Member—Priority.*—The period of time up to which investing members of a building society may withdraw so as to obtain priority, is the time when there is a stoppage of the society's

business, or a recognition, by those entitled to form a judgment, that the business must be stopped.—*In re Ambition Investment Building Society*, L.R. [1896] 1 Ch. 89; 73 L.T. 508; 44 W.R. 141.

### Bye-Law :—

- (i.) **P. C.**—*Validity—Corporation—Powers to Regulate Trade—Prohibition of Trade.*—A corporation had power to make bye-laws for "regulating and governing" hawkers. *Held*, that it had not power to prohibit hawkers from plying their trade at all in a substantial and important part of the city, no question of apprehended nuisance being raised.—*Toronto (Corporation of) v. Virgo*, 73 L.T. 449.

### Carrier :—

- (ii.) **C. A.**—*Carriage by Sea—Liability.*—Decision of Q. B. D. (*see* Vol. 21, p. 4, vi.) affirmed.—*Hill v. Scott*, L.R. [1895] 2 Q.B. 713; 73 L.T. 458.
- (iii.) **Q. B. D.**—*Passenger's Luggage—Sea-Carrier—Liability—Conditions of Contract—Merchant Shipping Act, 1894, s. 502 (2).*—A passenger on the defendants' ship received a ticket which purported to be a receipt for passage money. On the face was a reference to "conditions" on the back, and a statement that the owners were not responsible for loss of luggage. On the back was a condition that the owners should not be responsible for luggage unless a specified sum was paid. A box, part of the plaintiff's luggage, and containing money and jewellery, was lost on the voyage, being stolen, as was supposed, by one of the crew. *Held*, that the plaintiff had notice of the conditions on the back of the ticket which were part of the contract; and also that the shipowners were protected from liability by the section above-mentioned.—*Acton v. Castle Mail Packets Co.*, 73 L.T. 158.

### Charity :—

- (iv.) **Ch. D.**—"Scheme Legally Established"—*Deed of Foundation—Power of Sale—Charitable Trusts Act, 1855, s. 29.*—The deed of foundation of a charity is not a "scheme legally established" within the meaning of the section. Consequently the trustees of a charity who have contracted to sell land in exercise of the powers of sale contained in the deed of foundation cannot force their title upon the purchaser without first obtaining the consent of the Charity Commissioners to the sale.—*In re Mason's Orphanage and L. & N. W.R.*, L.R. [1896] 1 Ch. 54; 65 L.J. Ch. 32; 73 L.T. 465; 42 W.R. 61.
- (v.) **Ch. D.**—*Scholarship Fund—Action by Party Claiming a Scholarship.*—A scholarship was founded by a deed to be awarded to the pupil leaving a certain school "who should pass the best examination in subjects to be determined upon from time to time by the examiner." The plaintiff gained the highest number of marks at the examination, but the examiner reported that no candidate was deserving of the scholarship. *Held*, that the trustees of the scholarship fund were not bound to award the scholarship to the plaintiff.—*Rooke v. Dawson*, 65 L.J. Ch. 31; 73 L.T. 399; 44 W.R. 77.

### Colonial Law :—

- (vi.) **P. C.**—*Canada—Principal and Agent—Power of Attorney—Construction—Civil Code, Art. 181.*—Where, by a document indorsed "procuration générale et spéciale," a wife, being sole owner, constituted her husband "son procureur général et spécial" to administer her affairs, specifying such acts as drawing bills and making promissory notes. *Held*, that the wife's liability extended to all notes made by him, and was

not limited to such as were required for purposes of the administration.—*La Banque d'Hochelaga v. Jodoin*, L.R. [1895] A.C. 612; 64 L.J. P.C. 174.

**Company:—**

- (i.) **C. A.—Auditors—Duties of—Misfeasance Companies Act, 1890, s. 10.**—It is not part of the duty of an auditor of a banking company to advise the directors or shareholders as to what they ought to do. He must ascertain and state the true financial position of the company, taking reasonable care to see that the books are accurate. But he is not bound to guarantee the accuracy of the books or balance-sheet. If he fails in his duty and dividends are paid out of capital, he may be made liable for misfeasance, jointly with the directors.—*In re London and General Bank*; *e. p. Theobald*, L.R. [1895] 2 Ch. 673; 64 L.J. Ch. 866; 73 L.T. 304; 44 W.R. 80.
- (ii.) **Ch. D.—Contract to take Shares—Misrepresentation—Agent—Promoter.**—Where the directors of a company did not know, when allotting shares, that an application for shares was induced by the representations of a promoter, whom they knew to be applying to his friends to take shares, but who was not authorised to act on behalf of the company, or to make representations; *held*, that assuming material misrepresentations to have been made by him, the applicant for shares was not entitled to rescission of his contract as against the company.—*Lynde v. Anglo-Italian Hemp Spinning Co.*, 73 L.T. 502.
- (iii.) **Ch. D.—Debenture—Issue—Irregularity—Valuable Consideration—Directors' Authority.**—By one of the articles of the company it was provided that any debenture bearing the seal of the company and issued for valuable consideration, should bind the company notwithstanding any irregularity touching the authority of the directors or officers to issue the same. The company owed B., a director, a sum of money with interest at 6 per cent., and B. owed D. a smaller sum. It was arranged that the company should issue to B. a debenture, with 5 per cent. interest, for the amount of his debt to D., and that he should transfer it to D. The debenture bore the company's seal and was signed by B. and countersigned by the secretary. There were minutes of a directors' meeting at which the issue and sealing of the debenture was authorised. *Held*, that the debenture was given for valuable consideration, and that the irregularity in the issue was cured by the article mentioned.—*Davies v. R. Bolton & Co.* L.R. [1894] 3 Ch. 678; 63 L.J. Ch. 743; 71 L.T. 336.
- (iv.) **C. A.—Debentures—Validity—Fraudulent Preference—"Private" Company.**—P. had mortgaged his business to O.S. He had also borrowed £150 from the plaintiff, a brother of O.S. The plaintiff took proceedings to recover his money. P. and O.S. then formed a company to take over the business. By the agreement for the purchase of the business the company was to indemnify P. against his business debts. The only directors were to be P. and his brother. Debentures for £175 were issued to the plaintiff in discharge of his debt, and debentures were also issued to O.S. in consideration of the surrender of a bill, not then due, which P. had given to O.S. on the release of his mortgage security. The company was wound up, and the plaintiff commenced a debenture-holder's action. *Held*, that the directors had power to issue the debentures, because the company was bound to indemnify P. against his liability to the plaintiff; and that the power had not been improperly exercised, because the company had been formed for the purpose of taking over the business and paying the debts thereof. *Held*, also, that there was no fraudulent preference.—*Seligman v. Prince & Co.*, L.R. [1895] 2 Ch. 617; 64 L.J. Ch. 745; 73 L.T. 124; 44 W.R. 6.

- (i.) **Ch. D.—Debentures—Trust Deed—Removal of Trustees.**—The defendant corporation were trustees of the deed for securing the debentures of the plaintiff company. The majority of the debenture-holders sought to have them removed. They had suggested that their fees should be increased but had withdrawn the suggestion. Petitions had been presented to wind them up, but had been withdrawn, the financial difficulties of the corporation having been overcome. They were now solvent, and it did not appear that the interests of the debenture-holders were in danger. *Held*, that there was no case for removing them.—*Assets Realisation Co. v. Debenture Corporation*, 65 L.J. Ch. 74; 44 W.R. 126.
- (ii.) **C. A.—Directors—Quorum—Irregularity—Resolution to Wind-up.**—The notices convening the meeting at which a winding-up resolution was passed were issued under the authority of a meeting of the directors at which a quorum was not present. Six months afterwards the shareholders sought to have the winding-up resolution declared invalid. *Held*, that the Court would not interfere.—*Southern Counties Deposit Bank v. Rider*, 78 L.T. 374.
- (iii.) **C. A.—Formation of—Commission for Placing Shares.**—Where the services of brokers are reasonably necessary to assist in the issue of the capital of a company, a reasonable commission for placing shares can properly be paid to them out of capital, whether authorised by the memorandum or not.—*Metropolitan Coal Consumers' Association v. Scrimgeour & Co.*, L.R. [1895] 2 Q.B. 604; 65 L.J. Q.B. 22; 73 L.T. 137; 44 W.R. 35.
- (iv.) **Ch. D.—Rectification of Register—Shares Issued as Fully Paid—Registration of Contract after Allotment.**—Shares were issued as fully paid in pursuance of a contract, which was not registered till after allotment. At the time of registration the company was solvent. Neither the directors nor the shareholders were aware of the delay in registering the contract until some time afterwards, when the company was in debt. One of the shareholders gave notice of motion to rectify the register by removing their names, and re-registering them in respect of shares as fully paid. A winding-up petition was presented. *Held*, that the rectification might be made upon terms of due provision being made for the debts of the company incurred between the issue of the shares and the notice of motion.—*In re The Preservation Syndicate*, L.R. [1895] 2 Ch. 768; 64 L.J. Ch. 723; 73 L.T. 341.
- (v.) **Ch. D.—Reduction of Capital—List of Creditors—Companies Act, 1867, s. 13.**—Upon a petition for the confirmation of resolutions for the reduction of capital by extinguishing liability in respect of uncalled capital, or returning paid-up capital to the shareholders, there is no power to dispense with the settling of the list of creditors, although there is reason to suppose that there are no debts, or only debts of a trifling amount.—*In re Lamson Store Service Co.*; *In re National Reversionary Investment Co.*, L.R. [1895] 2 Ch. 726; 64 L.J. Ch. 777; 73 L.T. 311; 44 W.R. 42.
- (vi.) **Ch. D.—Reduction of Capital—Founders' Shares—Preference Shares—Ratification of Issue—Companies Act, 1862, s. 53.**—Founders' shares were, by the constitution of a company, in case of a winding-up, to bear in the first instance the loss of capital. Capital had been lost to such an extent that there was no prospect of their ever receiving anything. *Held*, that it was not unfair to reduce the capital by extinguishing them. Preference shares might be issued upon such terms as might be determined by special resolution. The directors issued shares preferred as to capital as well as dividend, and the issue was ratified by special resolution. *Held*, that the terms of issue were capable of ratification, and that the preference shareholders were not affected by the fact that no resolution had been registered before the

issue of their shares.—*In re London and New York Investment Corporation*, L.R. [1895] 3 Ch. 860; 64 L.J. Ch. 729; 73 L.T. 280; 44 W.R. 187.

- (i.) **Ch. D.**—*Shares—Issue as Fully Paid-up—Contract—Registration—Companies Act, 1867, s. 25.*—It was agreed in writing between the S. company and a trustee for the C. company (then being formed) that the latter should purchase from the former certain patent rights, the consideration to be cash or shares. The C. company was to allot to every shareholder in the S. company who should apply for the same, shares of £1 each, credited with 19s. paid-up. The C. company adopted the agreement by executing an indorsed deed. The agreement and deed were filed, and E. and M., as nominees of shareholders in the S. company, applied for and were allotted shares in the C. company, with 19s. credited as paid-up. *Held*, that the section above-mentioned had been complied with.—*In re Common Petroleum Engine Co.; Elsner and McArthur's Case*, L.R. [1895] 1 Ch. 759; 65 L.J. Ch. 76; 73 L.T. 338.
- (ii.) **Ch. D.**—*Winding-up—Contributory—Fully-paid Shares—Estoppel.*—Before the incorporation of a company P. gave W. £500 on W. promising to procure an allotment to P. of 100 fully-paid £5 shares in the company. W. was entitled to fully-paid shares under a contract, which was not filed, and obtained the allotment of 100 of them to P. as his nominee. The certificate stated untruly that the shares were fully paid. *Held*, in the winding-up, that the company were estopped from denying that the shares were fully paid, and that P. could not be made a contributory.—*In re Building Estates Brickfields Co.*, L.R. [1896] 1 Ch. 100; 73 L.T. 506; 44 W.R. 107.
- (iii.) **Ch. D.**—*Winding-up—Costs—Debentures—Deficiency of Assets.*—Where the debentures of a company are secured upon the whole capital, both present and future, but the assets are not sufficient to pay them in full, the petitioner is not entitled to payment of his costs of a winding-up petition, although the assets to a large extent consist of moneys recovered by the liquidator from the directors for misfeasance.—*In re Anglo-Austrian Printing and Publishing Co.*, L.R. [1895] 3 Ch. 891; 65 L.J. Ch. 38; 73 L.T. 442.
- (iv.) **C. A.**—*Winding-up—Manager abroad—Unpaid Salary—Claim to Prove—Rate of Exchange.*—A company agreed to pay its manager in Chili at the rate of £1,000 a year in monthly payments, "at such place or places and in such manner as he may direct." He drew bills on the company for the monthly payments payable in Chili in Chilean dollars at the current rate of exchange. The bills not having been paid, and the rate of exchange having fallen, *held*, that he was entitled to prove for the unpaid salary at the rate of £1,000 per annum.—*In re Tatal Chile Nitrate Co.*, 73 L.T. 422.
- (v.) **C. A.**—*Winding-up—Misfeasance—Auditor—Companies Act, 1890, s. 10.*—An auditor of a limited company was appointed under articles of association which, so far as they related to the audit of accounts, were substantially the same in terms as the audit clauses in Table A. *Held*, that he was an officer of the company within the section above mentioned.—*In re Kingston Cotton Mill Co.*, L.R. [1896] 1 Ch. 6; 73 L.T. 482.

**Copyhold**, see *Married Woman*, p. 41, vi.

**Copyright**:—

- (vi.) **Q. B. D.**—*Photograph Taken by Permission—Copyright Act, 1862, s. 1.*—The plaintiff received the permission of an actress to take her photograph. He made no charge and gave her some copies. *Held*, that he had a copyright in the photographs as author.—*Ellis v. Marshall*, 64 L.J. Q.B. 757.

**Corporation of London :—**

- (i.) **C. A.**—*Revenue—Metage on Grain Act, 1872, s. 4.*—The duty imposed on grain brought into the Port of London is payable only on grain which is intended to be sold as grain, and not on grain which is brought in to be mixed with other articles and sold for horse food.—*Cotton v. Vogan*, L.R. [1895] 2 Q.B. 652; 65 L.J. Q.B. 40; 44 W.R. 55.

**Counsel :—**

- (ii.) **C. A.**—*Compromise—Mistake—Evidence of Counsel.*—Where acting upon general instructions given by a client to compromise an action, counsel consents to a compromise under a misapprehension, inadvertently conceding something which he did not intend to concede, or where counsel on both sides are not *ad idem*, neither the counsel nor his client are bound by the compromise. The statement of a counsel as to the extent of his authority if made from his place at the bar will be accepted by the Court, without requiring it to be made upon oath.—*Hickman v. Berens*, L.R. [1895] 2 Ch. 638; 64 L.J. Ch. 785; 73 L.T. 323.

**Criminal Law :—**

- (iii.) **C. C. R.**—*Criminal Law Amendment Act, 1885, s. 11.*—*Held*, that where the prisoner had procured the commission by another male person of an act of gross indecency with himself there was an offence under the section above mentioned.—*Reg. v. Jones*, L.R. [1896] 1 Q.B. 4; 44 W.R. 110.

**Damages :—**

- (iv.) **C. A.**—*Contract—Breach—Remoteness.*—Decision of Q. B. D. (see Vol. 20, p. 104, i.) affirmed.—*Mowbray v. Merryweather*, L.R. [1895] 2 Q.B. 640; 65 L.J. Q.B. 50; 73 L.T. 459; 44 W.R. 49.

**Deed :—**

- (v.) **C. A.**—*Construction—Implied Covenant.*—Every obligation which, on a fair construction of the language of a deed, is imposed on one of the parties thereto amounts to an express covenant by him to perform that obligation. But the language must clearly shew an intention between the parties that the particular thing referred to should or should not be done.—*E. p. Willis; in re Cadogan and Hans Place Estate*, 73 L.T. 387.

**Design :—**

- (vi.) **C. A.**—*Registration—Protection.*—Decision of Ch. D. (see Vol. 21, p. 9, ii.) reversed.—*John Harper & Co. v. Wright and Butler Lamp Manufacturing Co.*, 73 L.T. 486.

**Easement :—**

- (vii.) **C. A.**—*Light and Air—Mandatory Injunction—Defendant Evading Service.*—Where the defendant in an action to restrain interference with ancient lights evaded service of the writ and proceeded with his building, *held*, that a mandatory injunction might be granted as regards so much of the building as had been erected since the issue of the writ.—*Van Joel v. Hornsey*, L.R. [1895] 3 Ch. 774; 73 L.T. 372.

**Gaming :—**

- (viii.) **C. A.**—*Stock Exchange—Cover—Gaming Act, 1845, s. 18.*—In an action to recover money deposited as cover for differences which might arise on gambling transactions in stocks and shares, it appeared that the money was treated by the defendants, to the knowledge

of the plaintiff, as appropriated to meet his losses to the defendants, and that the whole amount had been so appropriated before the plaintiff gave notice to terminate the gambling transaction. *Held*, that the plaintiff could not recover.—*Strachan v. Universal Stock Exchange Co.*, L.R. [1895] 2 Q.B. 697; 73 L.T. 492.

### Highway:—

- (i.) **C. C. & Q. B. D.**—*Main Roads—Footways—Urban Districts—Highways, &c.*, Act, 1878, s. 13—*Local Government Act*, 1888, s. 11.—A county council is liable to contribute towards the cost of maintaining and repairing the footways at the sides of disturnpiked roads in an urban district which have become main roads.—*In re Arbitration between the Mayor, &c., of Burslem and the County Council of Staffordshire*, L.R. [1896] 1 Q.B. 24; 65 L.J. Q.B. 1.

### Husband and Wife:—

- (ii.) **P. D.** *Divorce—Intervention of Queen's Proctor—Issues.*—On the intervention of the Queen's Proctor after a decree *nisi* for divorce by reason of the wife's adultery, the following questions were left to the jury:—(1) Did the petitioner know or have reason to believe that his wife had been guilty of adultery two years before he took action for divorce? (2) Were material facts withheld from the knowledge of the Court? On the questions being answered in the affirmative the decree *nisi* was rescinded.—*Brougham v. Brougham*, 64 L.J. P. 125.
- (iii.) **P. D.**—*Divorce—Variation of Settlements—Rectification of Consent Order.*—Upon the application of the testamentary guardians of an infant child of the marriage of the petitioner and respondent, the Court directed that an order which had been made upon the consent of the petitioner, respondent, and the trustees of the marriage settlement, should be varied by extinguishing the respondent's interest in part of the trust funds, the order having been made under mistake. The cost of all parties to be paid out of the said portion of the trust funds.—*Arkwright v. Arkwright*, 73 L.T. 287.
- (iv.) **P. D.**—*Nullity—Duress.*—The petitioner, a young girl, went through the form of marriage in a church with the respondent. He had never spoken to her of marriage, and she believed that the ceremony was only a betrothal. She acted under the influence of her mother. He left her immediately after the ceremony. *Held*, that she had not consented to marry the respondent, and had been under duress, and was entitled to a decree of nullity.—*Ford v. Stier*, L.R. [1896] P. 1.
- (v.) **P. D.**—*Nullity—Impotence—Offer to Resume Cohabitation.*—A husband and wife had cohabited for seven years, when the wife filed a petition for nullity on account of the husband's impotence. She afterwards offered to return to cohabitation. *Held*, that she was entitled to a decree.—*L. v. B.*, 64 L.J. P. 121.
- (vi.) **C. A.**—*Restitution of Conjugal Rights—Judicial Separation—Cruelty.*—A wife brought a suit against her husband for judicial separation, alleging that he had been guilty of an unnatural offence, and repeated the charge, although he was acquitted by the verdict of the jury. She then sued for the restitution of conjugal rights, which the husband opposed on the ground of cruelty on the part of the wife in making the charge, knowing it to be false; and he counter-claimed for judicial separation. *Held*, that the conduct of the wife justified the Court in refusing to decree restitution of conjugal rights; but that it did not amount to legal cruelty sufficient to support the counter-claim.—*Russell v. Russell*, L.R. [1895] P. 315; 64 L.J. P. 105; 73 L.T. 294.



- (i.) **P. D.**—*Separation Order—Maintenance—Justices—Jurisdiction.*—Where the justices have made a separation order against a husband, who had been convicted of an aggravated assault upon his wife, such order containing no provision for the wife's maintenance, there is no jurisdiction to make a subsequent order for maintenance.—*Woodhead v. Woodhead*, L.R. [1895] P. 848.

### Industrial Schools:—

- (ii.) **Q. B. D.**—*Industrial Schools Act, 1866, ss. 14, 15—Child dealt with without fresh Summons.*—A child under 14 was charged with larceny, and the charge was dismissed. *Held*, that the magistrates had jurisdiction to send him to an industrial school without a fresh summons, the Act being not penal but benevolent and protective for the benefit of children.—*Reg. v. Jennings*, L.R. [1896] 1 Q.B. 64; 73 L.T. 412; 44 W.R. 128.

### Innkeeper:—

- (iii.) **C. A.**—*Lien.*—Decision of Q. B. D. (see Vol. 20, p. 97, i.) affirmed.—*Robins v. Gray*, L.R. [1895] 2 Q.B. 501; 65 L.J. Q.B. 44; 44 W.R. 1.

### Landlord and Tenant:—

- (iv.) **Q. B. D.**—*Bankruptcy—Lease—Subsequent Agreement—Right of Distraint.*—The assignees of a tenant made an agreement with the landlord altering the terms on which the rent was to be paid under the demise. The assignees became bankrupt, and the landlord distrained for the rent due according to the demise, and not according to the new agreement. *Held*, that he was entitled to do so, as the new agreement merely postponed his right so long as the rent was paid on the altered basis.—*E. p. Official Receiver; in re Smith & Hartogs*, 73 L.T. 221.
- (v.) **C. A.**—*Lease—Implied Covenant for Title—Determination of Lessor's Interest—Eviction of Lessee.*—*Quere*, whether any covenant for title or quiet enjoyment can be implied in a lease by deed containing no express covenant to that effect, and not using the word "demise." If any such covenant can be implied no action can be brought thereon if the lessor's interest determines during the term, and the lessee is thereupon evicted.—*Baynes v. Lloyd*, L.R. [1895] 2 Q.B. 610; 64 L.J. Ch. 787; 73 L.T. 250.
- (vi.) **Q. B. D.**—*Parol Agreement—Non-continuous Letting—Statute of Frauds, s. 4.*—The defendant, who attended fairs with a "roundabout," verbally agreed with the plaintiff for the hire of a piece of land on three Bank Holidays, at the rent of £45; £15 to be paid for each Bank Holiday. He occupied the ground and paid the rent for the first Bank Holiday. *Held*, in an action for the balance of the rent, that the Statute of Frauds was no defence, there having been an occupation and payment of rent under an agreement for a single letting, though the period of letting was not continuous.—*Smallwood v. Sheppards*, L.R. [1895] 2 Q.B. 627; 64 L.J. Q.B. 727; 73 L.T. 219; 44 W.R. 44.

### Licensing:—

- (vii.) **Q. B. D.**—*Renewal—Annual Licensing Meeting—Adjournment—Private Room.*—No objection having been made to the renewal of a licence before the annual licensing meeting, the justices, adjourned the consideration of the renewal. Objection was made before the adjourned meeting, the applicant was served with notice and attended the adjourned meeting, at which the renewal was refused. *Held*, that the

proceedings were regular. There is no objection to the justices meeting in their private room to consider the expediency of adjourning particular licences for future consideration.—*Reg. v. Justices of Anglesea*, 65 L.J. M.C. 12.

**Limitations :—**

- (i.) **C. A.—Charge on Land—Charge and Land vested in same Person—Presumption of Payment.**—Decision of Ch. D. (see Vol. 20, p. 109, ii.) affirmed.—*Steward v. England*, L.R. [1895] 3 Ch. 820; 65 L.J. Ch. 21; 73 L.T. 237; 44 W.R. 119.

**Local Government :—**

- (ii.) **Q. B. D.—Street—Meaning of—London Building Act, 1894, s. 7.**—The quadrangle of a block of mansions, having only one entrance from the public highway, and that closed by gates, and intended exclusively for the use of residents in the mansions, is not a street within the meaning of the section.—*Carter Wood v. London County Council*, 64 L.J. M.C. 276; 73 L.T. 813; 44 W.R. 144.

**Lunatic :—**

- (iii.) **C. A.—Action in Name of—Leave to Bring—Jurisdiction—Lunacy Act, 1891, s. 27, sub-s. 1.**—A Master in Lunacy can, without any confirmation of his order by the Judge, give leave to the committee of a lunatic to bring an action in the name of the lunatic, in respect of an alleged breach of trust by trustees of a will under which the lunatic is a beneficiary.—*In re Hinchliffe*, 73 L.T. 522.
- (iv.) **C. A.—Bankruptcy—Property of.—Quære**, whether a lunatic can be made bankrupt except with the permission of the Judge in Lunacy. If he can be made bankrupt his property would vest in the trustee subject to the control of the Judge in Lunacy; and it would be required that provision for his maintenance should be made thereout.—*In re Farnham*, L.R. [1895] 3 Ch. 799; 64 L.J. Ch. 717; 73 L.T. 231.
- (v.) **C. A.—Resident Abroad—English Stocks—Transfer—Vesting—Lunacy Act, 1890, s. 134.**—A person resident in Victoria was declared lunatic by the Supreme Court of the Colony, and the Master in Lunacy of the Colony was appointed to manage her property, which consisted of English stocks standing in her name. *Held*, that there was jurisdiction to order the stocks to be transferred to such Master in Lunacy, and the Court, being satisfied that all the stocks were required for the maintenance of the lunatic, made the order accordingly, prefaced with a statement that the personal estate of the lunatic was "vested" in the Master within the meaning of the section above-mentioned.—*In re Brown*, L.R. [1895] 2 Ch. 666; 64 L.J. Ch. 808; 73 L.T. 375; 44 W.R. 17.

**Married Woman :—**

- (vi.) **Ch. D.—Declaration of Trust—Copyholds—Fines and Recoveries Act, s. 77.**—A declaration of trust by a married woman of copyholds of which she is tenant on the rolls by deed acknowledged under the Act binds the copyholds in the hands of her customary heir. She may create a trust of her non-separate copyholds by deed acknowledged under the Act with the concurrence of her husband. A declaration of trust is a "disposition" within the Act.—*Carter v. Carter*, L.R. [1896] 1 Ch. 62; 73 L.T. 437; 44 W.R. 73.
- (vii.) **Ch. D.—Reversionary Interest—Conveyance of—Fines and Recoveries Act, s. 77.**—By a settlement in 1855 land was conveyed to trustees upon trust for W. for life, and after his death upon trust for E., his

wife, until death or second marriage. There was a power to sell and invest the proceeds upon mortgage, but no power to invest in land. *Held*, that, after a sale of the land and investment of the proceeds upon mortgage, E.'s interest was an interest in personality, and not in land, and could not be conveyed by a deed acknowledged.—*Miller v. Collins*, 78 L.T. 530.

### Master and Servant:—

- (i.) **C. A.**—*Information Acquired during Employment—Use of.*—The good faith existing between master and servant renders it illegal, even in the absence of any stipulation to the contrary, for the servant to use after the termination of his employment any information or materials acquired during his employment, and the Court will restrain such use by injunction, in addition to awarding damages.—*Louis v. Smellie*, 73 L.T. 226.

### Metropolis Management:—

- (ii.) **Q. B. D.**—*Building—London Building Act, 1894, s. 212—Contract before Act.*—Shortly before the passing of the Act, A. contracted with B. to build a number of houses on B.'s land, and afterwards to take a lease of the land. The plans of the houses were to be approved by B., and the houses were to be built at the rate of ten in each year till 1899, when the contract would be completed. After the Act came into force, A. proposed to build a number of the houses in contravention of the Act, but in accordance with the Metropolitan Building Act, 1855. *Held*, that he was entitled to do so.—*Tanner v. Oldham*, L.R. [1896] 1 Q.B. 60; 65 L.J. M.C. 10; 73 L.T. 404; 44 W.R. 63.
- (iii.) **C. A.**—*Building Line—Certificate of Architect—Metropolis Management Act, 1862, s. 75.*—When an application is made for an order to demolish a building as being beyond the building line, the question whether the building is in the particular street the building line of which has been laid down by the superintending architect is to be decided by such architect, and not by the magistrate.—*Allen v. London County Council*, L.R. [1895] 2 Q.B. 587.

### Mortgage:—

- (iv.) **C. A.**—*Fund in Hand of Trustees—Successive Mortgages—Rights of Mortgagees to Fund.*—The trustees of a fund, which has been mortgaged by the beneficiary to first and subsequent mortgagees, are not compellable to pay the whole fund over to the first mortgagee, but only the part which represents his mortgage debt.—*Jeffery v. Sayles*, L.R. [1896] 1 Ch. 1; 73 L.T. 391; 44 W.R. 99.

### Nuisance:—

- (v.) **C. A.**—*Warning by Local Authority to Owner—Work done by Occupier—Right to Recover Cost—Public Health (London) Act, 1891, ss. 2, 4, 5, 11, 128, 130.*—A sanitary authority served on certain premises a warning, addressed to the owner, that if certain works were not done, they would commence proceedings against him by a statutory notice. The occupier did not inform the owner, but did the work himself. *Held*, that he had acted as a volunteer, and could not recover the expenses from the owner.—*Thompson and Norris Manufacturing Co. v. Hawes*, 73 L.T. 369.

### Partnership:—

- (vi.) **H. L.**—*Goodwill—Stipulations as to—Breach of.*—Decision of C. A. (*see* Vol. 20, p. 81, iii.) reversed.—*Trego v. Hunt*, 65 L.J. Ch. 1; 73 L.T. 514.

- (i.) **C. A.**—*Loan—Share of Profits.*—A loan to a trader for an agreed term, with interest at five per cent., and a further sum by way of additional interest equal to one half share of the profits, but repayable as an aggregate sum at any time within the term upon three months' notice by the lender to the trader, does not of itself constitute a partnership between them.—*King v. Wichelow*, 64 L.J. Q.B. 801.

**Patent:—**

- (ii.) **P. C.**—*Improvements on Old Machine.*—When a patent is for improvements on an old and known machine, the exclusive rights of the patentee cannot be permitted to exceed the exact terms of his specification.—*Brown v. Jackson*, 64 L.J. P.C. 180.

**Practice:—**

- (iii.) **C. A.**—*Administration Action—Bankruptcy of Defendant—Transfer of Action—Procedure—Bankruptcy Act, 1883, s. 102, sub-s. 4.*—An action was commenced against the trustee of a will, a partner in the testator's business, claiming a declaration that the assets of the business formed part of the testator's estate, that the partnership affairs should be wound-up, and that the defendant should be removed from being a trustee. A receiver was appointed to get in the estate, and the assets of the business. The defendant then became bankrupt. His trustee in bankruptcy applied that the receiver should be discharged, and the action transferred to the Bankruptcy Court, so far as it referred to the assets of the business. *Held*, that the application should have been made to the Bankruptcy Court.—*Stewart v. Somes*, 73 L.T. 359.
- (iv.) **Q. B. D.**—*Appeal from Justices—Recognizance—Company.*—Where a company is required to enter into a recognizance, the same may be entered into by a director or member of the company acting for and on behalf of the company. If the company is in liquidation, a director or member has no authority so to act, and the liquidator cannot afterwards ratify his action if he enters into such recognizance.—*Southern Counties Deposit Bank v. Boaler*, 73 L.T. 155.
- (v.) **C. A.**—*Appeal—Trial by Judge without Jury.*—On an appeal in a case tried by a Judge without a jury the presumption is that his decision on the facts is right, and if there is any doubt the Court of Appeal will not disturb his decision.—*Colonial Trust Securities Co. v. Massey*, 73 L.T. 497.
- (vi.) **C. A.**—*Bankers' Books Evidence Act, 1879, s. 7.*—In an application under the Act for leave to inspect before trial bankers' books containing entries of the banking account of a party to an action, he may rely upon the same privilege as to items which he swears are irrelevant to the matters in question, as existed in other applications for inspection before trial made before the Act. *Semble*, that there is jurisdiction to grant leave to inspect before trial bankers' books containing the account of a person not a party, if the applicant shows that there must be in the account items which would be evidence at the trial against a party to the action.—*South Staffordshire Tramways Company v. Ebbwsmith*, L.R. [1895] 2 Q.B. 669; 73 L.T. 454; 44 W.R. 97.
- (vii.) **Ch. D.**—*Discovery—Fraud—Solicitor and Client—R.S.C., 1887, O. xxxi., r. 19a, sub-r. 2.*—The plaintiff charged the defendant company with fraud. On a motion for production of documents: *Held*, that communications between the defendants and their solicitor as to the subject-matter of the alleged fraud were not privileged.—*Williams v. Quebrada Railway Company*, L.R. [1895] 2 Ch. 751; 65 L.J. Ch. 68; 73 L.T. 397; 44 W.R. 76.

- (i.) **C. A.**—*Discovery—Particulars—Fraud—R.S.C.*, 1883, O. xix., r. 6.—A colliery company commenced an action against coal merchants, alleging that they had lost business through the fraudulent acts of the defendants, giving one specific instance of fraud (which the defendants admitted) and alleging that on "divers other occasions" the defendants had taken orders from "divers other persons" for the plaintiffs' coal, and had supplied other coal. *Held*, that as the defendants had means of ascertaining from their books whether other frauds of the kind alleged had been committed, which the plaintiffs had not, the defendants were not entitled to particulars before giving discovery.—*Waynes Merthyr Company v. Radford and Company*, L.R. [1896] 1 Ch. 29; 44 W.R. 103.
- (ii.) **C. A.**—*Divorce—Suing in Formâ Pauperis.*—Decision of P. D. (*see* Vol. 21, p. 17, i.) affirmed.—*Richardson v. Richardson*, L.R. [1895] P. 346; 73 L.T. 135; 44 W.R. 102.
- (iii.) **C. A.**—*Order for Payment of Costs—Action upon—Solicitor—Attachment—R.S.C.*, 1883, O. xlii., r. 24.—An action will lie upon an order of the Court by which a solicitor was ordered to pay the costs of an application to strike him off the rolls, notwithstanding the fact that an unsuccessful application to attach him for disobedience to the order has been made.—*Godfrey v. George*, L.R. [1896] 1 Q.B. 48.
- (iv.) **C. A.**—*Parties—Joinder of Defendants—R.S.C.*, 1883, O. xvi., r. 4.—The plaintiff had a shop, on either side of which was a receiving house which belonged to two different railway companies. He alleged that their parcel vans prevented access to his shop, and he sued the companies for damages and an injunction. It was conceded that they were not acting in concert. *Held*, that he could not sue them for damages jointly.—*Sadler v. W.R.*, L.R. [1895] 2 Q.B. 688; 65 L.J. Q.B. 26; 73 L.T. 385; 44 W.R. 50.
- (v.) **Ch. D.**—*Parties—Action by Lunatic by his Committee—Lunatic adjudicated Bankrupt—Trustee added as Defendant—Stay of Proceedings.*—Where an action has been brought by the committee of a lunatic, and the lunatic is subsequently adjudicated bankrupt, the right of action vests in his trustee in bankruptcy; and if he declines to prosecute the action he cannot be added as a defendant against his will. If he is so added he is entitled to have the action stayed as against him.—*Farnham v. Milward & Co.*, L.R. [1895] 2 Ch. 730; 64 L.J. Ch. 816; 73 L.T. 434; 44 W.R. 135.
- (vi.) **C. A.**—*Patent—Appeal—Amendment of Particulars of Objection—R. S. C.*, 1883, O. lviii., r. 4—*Patents, &c., Act*, 1883, s. 29.—Pending an appeal in an action for infringement of a patent, the Court of Appeal has jurisdiction to allow the defendant to amend his particulars of objection, and to adduce further evidence.—*Shoe Manufacturing Co. v. Cutlan*, 65 L.J. Ch. 44; 73 L.T. 419; 44 W.R. 92.
- (vii.) **Ch. D.**—*Payment into Court—Admissions—Parties—Joinder—R.S.C.*, 1883, O. xvi., rr. 1, 11; O. xviii., r. 6; O. xxxii., r. 6.—On a motion by some of the plaintiffs that the defendant might be ordered to bring trust funds into Court, on the ground that he had admitted that they had been in the hands of W., of whom he was legal personal representative: *Held*, that the motion could not be made by some of the plaintiffs without the concurrence of the others.—*Kirke v. North*, L.R. [1895] 2 Ch. 747; 65 L.J. Ch. 37; 73 L.T. 396; 44 W.R. 125.
- (viii.) **Ch. D.**—*Payment into Court—Order on Admissions.*—B., a solicitor, acting for trustees of a will, put up for sale part of the testator's real estate, which was subject to two mortgages. To meet an objection of the purchaser, B. procured a transfer of the first

mortgage to his son W., and got him to convey to the purchaser in exercise of the power of sale in the mortgage. B. paid the first mortgage out of the purchase money, and retained the balance without giving notice to the second mortgagee. The latter sued B., W., and the trustees for the balance, and moved for the payment thereof into Court. B. filed an affidavit and account, and claimed to retain: (1) moneys paid to the trustees or to creditors of the testator on their account; (2) a sum for which he was liable on a guarantee given by him for money borrowed by the trustees for the like purpose; (3) a sum for the costs of sale. *Held*, that no deduction could be allowed in respect of (2) and (3) though B. would be allowed proper costs on proof that he had paid them. But as to (1) B. would not be ordered on his admission to pay in moneys not actually in his possession though improperly paid away.—*Crompton and Evans Union Bank v. Barton*, L.R. [1895] 2 Ch. 711; 64 L.J. Ch. 811; 73 L.T. 181; 44 W.R. 60.

- (i.) **C. A.—Pleading—Counter-claim.**—A person named in a defence as a party to a counter-claim thereby made is entitled to defend himself against such counter-claim, but not also to raise a counter-claim against the defendant and the plaintiff.—*Greenhill v. Alcoy, &c., Co.; Trustees, Executors, and Securities Insurance Corporation v. Alcoy, &c., Co.*, L.R. [1896] 1 Ch. 19; 73 L.T. 452; 44 W.R. 117.
- (ii.) **C. A.—Third Party Procedure—Indemnity.**—A charter-party provided that the ship should be discharged at the port of delivery as customary. The charterers, the defendants, sold the cargo to D., who contracted that the cargo should be taken "from over the ship's side as fast as the captain can deliver." D. was to be liable for "any loss, demurrage, or other expenses arising therefrom." The ship-owners sued the defendants for not unloading the ship according to the terms of the charter-party. *Held*, that a third party notice ought not to be issued against D., as his contract was not one to indemnify the defendants against their liability under the charter-party.—*Constantine v. Warden*, 73 L.T. 450.
- (iii.) **C. A.—Writ—Agreement that Writ may be Served out of Jurisdiction.**—An agreement by a person domiciled in Scotland that a writ for breach of contract arising within the jurisdiction may be served on him in Scotland does not authorize the Court to direct service of such a writ on him in Scotland.—*British Wagon Co. v. Gray*, L.R. [1896] 1 Q.B. 35; 73 L.T. 498; 44 W.R. 113.
- (iv.) **C. A.—Writ—Service out of Jurisdiction—R.S.C., 1883, O. xi., r. 1 (f).**—Manufacturers in Switzerland, in reply to a letter from retail dealers in England asking them to send some dye, replied by a letter enclosing an invoice. The invoice described the goods as "bought" by the dealers from the manufacturers, and stated that they were sent to a specified firm in Switzerland "to be held by them at your disposal." *Held*, that there was a *prima facie* case of a sale within the jurisdiction, so that notice of a writ in an action for infringement of the plaintiffs' patent rights might be served on the manufacturers.—*Badische Anilin und Soda Fabrik v. Johnson*, L.R. [1896] 1 Ch. 25; 73 L.T. 523.  
*See Ship*, p. 48, i.

### Prescription:—

- (v.) **C. A.—Easement—Opening River Locks.**—Decision of Ch. D. (*see* Vol. 21, p. 18, iii.) affirmed.—*Simpson v. Corporation of Godmanchester*, 64 L.J. Ch. 887; 73 L.T. 423.

**Presumption of Death:—**

- (i.) **P. D.**—*Practice*.—On an application for leave to swear an affidavit of the death of a person who had not been heard of for twenty-five years, the Court required that advertisements should be published asking for information concerning him, though the estate was small.—*In the goods of Robertson*, L.R. [1896] P. 8.

**Principal and Surety:—**

- (ii.) **Q. B. D.**—*Co-sureties—Alteration of Instrument—Discharge*.—Four persons, as sureties for a principal, executed a joint and several bond, by which the liability of two of them was limited to £50 each, and that of the other two to £25. One of the former two executed the bond after the other three had executed it, but added to his signature the words “£25 only.” *Held*, that this was a material alteration in the bond which discharged the other three sureties; and that as the last signatory only executed it as a joint and several bond he also was not bound.—*Ellesmere Brewery Co. v. Cooper*, L.R. [1896] 1 Q.B. 75.

**Railway:—**

- (iii.) **H. L.**—*Forwarding of Traffic—Statutory Obligation—Right of Public to Enforce—Railway and Canal Traffic Act, 1888, s. 29*.—Decision of C. A. (see Vol. 19, p. 56, v.) reversed.—*Davis v. Taff Vale Railway Company*, L.R. [1895] A.C. 542.
- (iv.) **C. A.**—*Severed Lands—Level Crossing—Severance of Ownership—Railways Clauses Act, 1845, s. 68*.—(See Vol. 20, p. 117, ii.) *Held*, that the conveyance to P. was a final abandonment of the right to use the crossing; and further, that the right to use the same, being only a statutory accommodation to remedy the inconvenience caused by the severance of lands belonging to the same owner, ceased when the ownership of the lands was severed.—*M.R. v. Gribble*, L.R. [1895] 3 Ch. 827; 64 L.J. Ch. 826; 73 L.T. 270; 44 W.R. 133.

**Registration:—**

- (v.) **Q. B. D.**—*Claim—Qualification—Amendment*.—A person claiming registration mentioned his qualification as a dwelling-house and mentioned two houses in the description of the qualifying property. *Held*, that the revising barrister was right in amending the claim by inserting the word “successive.”—*Soutter v. Roderick*, L.R. [1896] 1 Q.B. 91.
- (vi.) **Q. B. D.**—*Married Woman—Ownership—Parochial Electors*.—A married woman, owning but not occupying land, being debarred by want of occupancy from being on the local government register, and being debarred by her sex from being on the parliamentary register, cannot be placed on the register of parochial electors.—*Drax v. Ffooks*, L.R. [1896] 1 Q.B. 1; 73 L.T. 407; 44 W.R. 78.
- (vii.) **Q. B. D.**—*Notice of Objection—Omission—Mistake—Amendment*.—A notice of objection was served on A., whose name was on the list of voters for the parish of X., in the borough of Y., which contained twenty-seven parishes. The notice set out the number of A. on the list, and the grounds of objection, but omitted to state the parish in the list of which his name appeared. *Held*, that the notice could be, and ought to be, amended by the revising barrister.—*Sandford v. Beal*, 73 L.T. 406.
- (viii.) **Q. B. D.**—*Parochial Elector—Parish in Parliamentary Borough—Freemen—Local Government Act, 1894, s. 2, sub-s. 1; s. 75, sub-s. 2*.—The fact of a person being on the list of freemen for a parliamentary borough does not entitle him to have his name entered in the parochial electors’ list for a parish within the borough in which he resides.—*Hart v. Beard*, L.R. [1896] 1 Q.B. 54; 73 B.T. 535.

**Revenue:—**

- (i.) **C. A.**—*Income Tax—Deductions—Money Expended for the Purpose of Trade.*—The appellants, in buying the business of another company, agreed to retain the manager of that company, or else to pay him a lump sum in commutation of his salary. They elected not to retain him, and paid him a lump sum. *Held*, that the money so paid was not "wholly and exclusively laid out or expended for the purposes of" the business within the meaning of the schedule to the Income Tax Act, 1842, and could not therefore be deducted from the gross profits for the purposes of income tax.—*Watson v. Royal Insurance Co.*, L.R. [1896] 1 Q.B. 41; 73 L.T. 524; 44 W.R. 89.
- (ii.) **Ch. D.**—*Probate Duty—Option to Purchase—Deed—Conversion.*—A father, about to enter into partnership with his sons, leased to them certain property, partly freehold. The articles of partnership gave the firm an option to purchase the premises within six months after the father's death. The father's will extended the period to three years. The firm did not purchase within six months of the father's death, but purchased within three years, with a condition, not contained either in the articles or the will, that the purchase money should remain on mortgage. *Held*, that probate duty was not payable on the purchase money of the freeholds, as they were not converted at the father's death.—*Goodall v. Goodall*, 65 L.J. Ch. 63; 73 L.T. 879; 44 W.R. 70.

**Riparian Owner:—**

- (iii.) **Ch. D.**—*Accretion—Non-Tidal River.*—A riparian owner on a non-tidal river is entitled to accretions to his land by reason of the gradual and almost insensible receding of the water, in a case where the actual river bed belongs to a separate owner.—*Hindson v. Ashby*, L.R. [1896] 1 Ch. 78; 73 L.T. 468.

**Settled Land:—**

- (iv.) **Ch. D.**—*Capital Moneys—Directions by Tenant-for-Life as to Investment.*—The exercise in good faith of the power of direction as to the investment or other application of capital moneys in the hands of the trustees given to the tenant-for-life by sub-s. 2 of s. 22 of the Settled Land Act, 1882, cannot be controlled by the trustees or the Court.—*In re Lord Coleridge's Settlement*, L.R. [1895] 2 Ch. 704; 73 L.T. 206; 44 W.R. 59.
- (v.) **Ch. D.**—*Settlement—Act of Parliament—Thelusson Act—Next-of-Kin—Settled Land Act, 1882, s. 2, sub-ss. 1, 5; s. 58; sub-s. 1, cl. v.*—Where a will, containing directions to accumulate, was void under the Thelusson Act, and the accumulations went to the testator's next-of-kin, *held*, that the will and the Act together constituted a "settlement." The representatives of a deceased next-of-kin and the surviving next-of-kin were, under the Thelusson Act, entitled to receive the rents to be accumulated for the life of another. *Held*, that they had jointly the powers of a tenant-for-life.—*Vine v. Raleigh*, L.R. [1896] 1 Ch. 87.

**Sheriff:—**

- (vi.) **C. A.**—*Execution—Forcible Entry.*—In levying execution under a writ of *fi. fa.*, the sheriff may break open the outer door of premises occupied by the debtor, provided they are not occupied as a dwelling-house.—*Hodder v. Williams*, L.R. [1895] 2 Q.B. 663; 73 L.T. 894; 44 W.R. 98.

**Ship:—**

- (vii.) **P. D.**—*Bill of Lading—Exemptions—Fault in Management.*—Goods were shipped under a bill of lading which exempted the shipowners



from liability for damage "resulting from fault or errors in navigation, or in the management of the vessel." After arriving at the port of discharge, water was let into a ballast tank, and, owing to an injury which had occurred to a pipe during the voyage, and which could have been ascertained but for the negligence of those on board, the water entered the hold and damaged the goods. *Held*, that the damage was caused by an error in the management of the vessel within the words of the bill of lading.—*The Glenochil*, L.R. [1896] P. 10; 65 L.J. P. 1; 73 L.T. 416.

- (i.) **C. A.**—*Bill of Lading—Implied Warranty—Frozen Meat—Fitness of Apparatus—Practice—Issues of Fact.*—A "refrigerator bill of lading" by which the shipowner undertakes to deliver frozen meat in good order and condition, contains an implied warranty that the refrigerating machinery in the ship is fit, at the time of shipment, to preserve the meat under the circumstances of an ordinary voyage. Where a preliminary point of law has been ordered to be tried before the trial of issues of fact, those issues will not be tried until the point of law has been finally determined.—*Owners of Cargo on S.S. Maori King v. Hughes*, L.R. [1895] 2 Q.B. 550; 64 L.J. Q.B. 774; 73 L.T. 141; 44 W.R. 2.
- (ii.) **C. A.**—*Charter-Party—Demurrage—Incorporation of Colliery Guarantee.*—A charter-party provided that the ship should proceed to a customary loading place at G. and receive a cargo of coal to be loaded as customary at G., "as per colliery guarantee," in fifteen colliery working days. By a colliery guarantee the colliery company agreed with the charterers to load the ship in fifteen working days, time to count from the day after that on which notice of readiness to receive should be given. The customary loading place was under a shoot. Notice of readiness was given on September 3rd. The ship had to wait her turn to go under the shoot, and, but for delay for which the charterers were responsible, could have gone under it on September 17th. She did not, in fact, get under it till October 10th, and the loading was completed on October 13th. *Held*, in an action for demurrage, that the colliery guarantee was incorporated in the charter-party, and that the lay days commenced from September 4th.—*Monsen v. Macfarlane & Co.*, L.R. [1895] 2 Q.B. 562; 65 L.J. Q.B. 57.
- (iii.) **C. A.**—*Charter-party—Deviation.*—Decision of Q. B. D. (see Vol. 21, p. 21, v.) affirmed.—*Caffin v. Aldridge*, L.R. [1895] 2 Q.B. 649; 73 L.T. 426; 44 W.R. 129.
- (iv.) **Q. B. D.**—*Charter-party—Freight—Vacant Space.*—Ships chartered by the plaintiffs having loaded ore, went to New Zealand to fill up, under sub-charters, the unoccupied space. The defendants entered into a sub-charter for one of the ships. The plaintiffs guaranteed some 5,000 tons space at a freight of 30s. per ton of forty cubic feet. In the ordinary course of business the contemplated cargo would be wool. The defendants instead filled up with grain, which brought the ship down to her marks, leaving a space of 900 tons empty. *Held*, that as a wool cargo had been contemplated which would have filled the ship without bringing her down to her marks, and it had not been intended that she should come home partly empty, the defendants must pay freight for the empty space.—*Potter & Co. v. New Zealand Shipping Co.*, 64 L.J. Q.B. 689.
- (v.) **P. D.**—*Co-ownership Action—Re-opening Accounts—Limitations.*—The relations between the co-owners of a ship engaged in foreign voyages and her managing owners are, in the absence of evidence to shew that each voyage is a separate trading transaction, to be treated as a continuous partnership or agency, as the case may be. Therefore the

accounts may be gone into without any limit as to time, and the Statute of Limitations does not apply so long as the partnership or agency is continuous.—*The Pongola*, 73 L.T. 512.

- (i.) **P. D.**—*Collision—Fog—Tug and Tow.*—The obligation which rests on a steamship approaching another steamship in a fog to stop, does not rest on a tug and tow; hence a tug and tow which were being navigated as slowly as possible, were held not to blame, though the tug did not stop when there were indications of danger.—*The Lord Bangor*, L.R. [1896] P. 28; 65 L.J. P. 6; 73 L.T. 414.
- (ii.) **C. A.**—*Insurance—Abandonment—Freight—Cash Advances.*—Decision of P. D. (see Vol. 21, p. 22, vii.) affirmed.—*The Red Sea*, L.R. [1896] P. 20; 73 L.T. 462.
- (iii.) **P. D.**—*Insurance—Live Cattle—Detention—Extra Fodder.*—A marine policy of insurance on live cattle against all risks, including mortality from any cause whatever, makes the insurer liable, under the suing and labouing clause, for the extra cost of fodder supplied to the cattle during detention at a port of refuge for necessary repairs.—*The Pomeranian*, L.R. [1895] P. 349.
- (iv.) **Q. B. D.**—*Re-insurance—Construction.*—A policy\*of re-insurance provided that the insurance was to be "subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon, but against the risk of total or constructive total loss only." Held, that the insurers were not bound to indemnify the insured who had in good faith paid as for a constructive total loss, when in fact there was no constructive total loss.—*Chippendale v. Holt*, 73 L.T. 472; 44 W.R. 128.
- (v.) **Q. B. D.**—*Light Dues—Exemption—Order in Council, 16th of May, 1893.*—The master of a ship took on board at Malta three persons who wished to go to England. They paid no passage money, and the master provided their food, for which they paid him £4 each. The vessel touched at an English port to obtain bunker coal, and the three persons were there landed. Held, that the landing of these persons did not deprive the vessel of her exemption from light dues at that port.—*Hay v. Trinity House*, 73 L.T. 471.
- (vi.) **Q. B. D.**—*Port Dues—Light Dues.*—A charter-party provided that the charterers might ship cattle for D. or destination. If discharged at D. the charterers were to pay port charges. Cattle were shipped for D. and landed there. The ship was compelled before leaving D. to pay all light dues up to and including L. The light dues would have been payable at L. if the ship had not touched at D. Held, that these light dues were port charges within the charter-party, and that the charterer must pay them.—*Newman, Dale and Company v. Lamport and Holt*, L.R. [1896] 1 Q.B. 20; 73 L.T. 476.
- (vii.) **Q. B. D.**—*Mortgage—Hire Purchase Agreement—Attaching Goods to Ship—Factors Act, 1889, s. 9.*—A. owned a fishing-smack which he mortgaged to B. He then entered into a hire purchase agreement with C. for a trawling warp, which he attached to the smack. B. took possession of the smack and warp under the mortgage. C. then forcibly took possession of the warp. Held, that the property in the warp had passed to B., and that C. was guilty of a trespass.—*Hull Rope Works Company v. Adams*, 73 L.T. 446; 44 W.R. 108.
- (viii.) **P. D.**—*Salvage—Gas Float—Definition of Ship—Merchant Shipping Act, 1854, ss. 2, 458, 460.*—A gas float moored as a beacon is in the same position as regards salvage services as a ship at anchor.—*The Whitton*, L.R. [1895] P. 307; 73 L.T. 319.

**Solicitor:—**

- (i.) **Ch. D.—Costs—Agreement in Writing—Business in Inferior Courts—Attorneys and Solicitors Act, 1870, ss. 4, 8, 10, 15.**—A document purporting to be an agreement as to the payment of costs may fall within sect. 4 of the Act, even though signed only by the client. Costs of business done in police or quarter sessions courts are liable to taxation in the ordinary way; and an agreement as to the payment of such costs may be examined and set aside by a Judge of the High Court. The expressions "the Court" or "a Judge" in sects. 8 and 10, do not include police or quarter sessions courts, or the Justices constituting the same.—*In re Jones*, L.R. [1895] 2 Ch. 719; 64 L.J. Ch. 832; 44 W.R. 10.
- (ii.) **Ch. D.—Costs—Scale Fee—Sale by Auction.**—If the purchaser, in pursuance of a condition of sale, pays a fee to the auctioneer, the solicitor is not entitled to the scale fee for conducting a sale by auction. If the solicitor himself pays the auctioneer, he is entitled to the scale fee.—*Cholditch v. Jones*, L.R. [1896] 1 Ch. 42; 73 L.T. 528; 44 W.R. 124.
- (iii.) **Ch. D.—Trustee—Following Trust Money—Banking Account—Appropriation of Payments.**—A solicitor paid several sums of money, received on account of clients, into his own banking account successively, and drew out money for his own use, so that the balance standing to the credit of the account became less than the total sum belonging to clients paid in. After his death the balance was paid into Court in an administration action. *Held*, that the sum first paid in must be held to have been the first drawn out, so that the sum due to the first client formed no part of the ultimate balance, and a claim on the part of such client to be paid out of such balance failed.—*Wood v. Stenning*, 73 L.T. 207.
- (iv.) **C. A.—Undue Influence—Gift to Solicitor's Wife.**—No evidence can be adduced to rebut the presumption of undue influence which arises when a client, acting without independent advice, makes a gift to his solicitor. The same rule applies to a gift to his solicitor's wife, and the fact that she is a relation of the client is not material.—*Liles v. Terry*, L.R. [1895] 2 Q.B. 679; 65 L.J. Q.B. 34; 73 L.T. 428; 44 W.R. 116.

**Trade Description:—**

- (v.) **Q. B. D.—Place of Manufacture—Merchandise Marks Act, 1887, ss. 2, 3.**—B. had in his possession goods which were described in the trade as "Le Dansk, French Factory." Ninety per cent. of the material was produced in France, and known as oleo-margarine; the remaining ten per cent. was added in England. *Held*, that the goods were produced in England, and that the description was a false trade description within the Act.—*Bischof v. Toler*, 64 L.J. M.C. 4; 73 L.T. 402.

**Trade Mark:—**

- (vi.) **Ch. D.—"Fancy Word"—Patents, &c., Act, 1888, s. 64, sub-s. 1 (c).**—The word "Shakespeare" applied to cigars is not a fancy word within the section.—*In re Banks and James's Trade Mark*, 44 W.R. 32.

**Trust:—**

- (vii.) **Ch. D.—Breach of—Following Trust Funds—Satisfaction.**—A father appropriated trust funds and settled part of the proceeds thereof upon the marriage of his son, who was ignorant of the source of the

settled property. *Held*, that the representatives of the son were entitled to have his share of the trust funds which had been so appropriated replaced only after deducting the value of the proceeds which had been so settled. A debt due from a father to a son is not satisfied, in whole or in part, by a gift of less amount, or contingent, or uncertain in nature. The reversionary interest of a son in funds settled upon his parents' marriage, and which have come into his father's hands, is not a portion so as to be satisfied in part by a payment by the father of a less amount.—*Crichton v. Crichton*, L.R. [1895] 3 Ch. 853; 65 L.J. Ch. 13.

**Trustee:—**

- (i.) **Ch. D.—Breach of Trust—Trustee and Beneficiary—Loss—Liability for.**—The two trustees of a will committed a breach of trust in investing trust moneys upon eight unauthorised securities. After the date of the first four investments, one of the trustees became a beneficiary. The trust was administered in Court. The eight investments were realized at a loss, the greater part of which was in respect of the second four investments. The trust moneys became insufficient, after satisfying the other beneficiaries, to provide for the share of the trustee who was also a beneficiary. *Held*, that he could not call upon his co-trustee to bear any part of the loss which he had sustained by reason of the breach of trust.—*Chillingworth v. Chambers*, 64 L.J. Ch. 803; 73 L.T. 208; 44 W.R. 32.
- (ii.) **Ch. D.—Breach of Trust—Investment—Commission.**—Trustees of a residue had power to invest it as they should think fit. They invested part of it in the debentures of a company. One of them received a commission from the company. The other, who was tenant-for-life of part of the residue, *bonâ fide* believed the investment to be good. The latter was since deceased. *Held*, that his estate could not be made liable for loss occasioned by the investment, but that the other trustee was liable both to make good the loss, and to hand over the commission to the trust estate.—*Smith v. Thompson*, L.R. [1896] 1 Ch. 71.  
See Solicitor, p. 50, iii.

**Vendor and Purchaser:—**

- (iii.) **C. A.—Land Sold Subject to Incumbrances—Conveyancing Act, 1881, s. 25.**—Decision of Ch. D. (see Vol. 20, p. 123, ii.) affirmed.—*Freme v. Hall*, L.R. [1895] 3 Ch. 778; 64 L.J. Ch. 862; 73 L.T. 366.
- (iv.) **Ch. D.—Misrepresentation—Laches.**—Where a purchaser finds that a representation made by the vendor is untrue, and the vendor suggests that if time be given him he can cure the misrepresentation, the purchaser does not, by giving time, lose his right to rely upon the misrepresentation and rescind the contract, if the vendor fails to make good his suggestion.—*Tibbatts v. Boulter*, 73 L.T. 534.
- (v.) **Ch. D.—Sale by Tenant-for-Life—Rentcharge—Release of—Improvement of Land Act, 1864, ss. 68, 69—Settled Land Act, 1882, s. 5.**—The tenant-for-life of land, subject to a rentcharge under the Improvement of Land Act, contracted to sell part thereof free from incumbrances. The vendor and the owner of the rentcharge undertook to execute a deed of exoneration of the charge. *Held*, that the purchaser was entitled to require the sanction of the Board of Agriculture.—*Earl of Stamford v. Maples*, 73 L.T. 440.
- (vi.) **Ch. D.—Specific Performance—Conditional Agreement—Waiver.**—The vendor signed, and the purchaser accepted, a memorandum as follows: "Subject to the preparation by my solicitor and completion of, a

formal contract, I am willing to sell to you the lease of," &c. The price and other terms were specified. *Held*, that the condition was not for the benefit of the vendor only, and could not be waived by him, and that as the condition was of the essence of the contract there was no memorandum in writing within the Statutes of Frauds.—*Lloyd v. Newell*, L.R. [1895] 2 Ch. 744; 64 L.J. Ch. 744; 73 L.T. 154; 44 W.R. 48.

### Water Company :—

- (i.) **H. L.**—*Parliamentary Powers—Interference with Water Supply.*—Decision of C. A. (see Vol. 20, p. 92, iv.) affirmed.—*Mayor, &c., of Bradford v. Pickles*, L.R. [1895] A.C. 587; 64 L.J. Ch. 759; 73 L.T. 853.

### Will :—

- (ii.) **C. A.**—*Codicil—Revocation of Gift in Will—Fresh Gift.*—A testator gave to each of his granddaughters an annuity of £300, and directed the annuities to be paid after their respective deaths among their children as they should appoint, and, in default of appointment, equally. He charged the annuities upon an estate. By codicil he revoked the gift of the annuities, and instead thereof gave to each of his granddaughters an annuity of £150 to be paid in the same manner and charged on the same estate as the annuities given in the will. The codicil did not mention children. *Held*, that the effect was to substitute an annuity of £150 payable to each granddaughter and her children for the annuity of £300 given by the will.—*Fremer v. Hall*, L.R. [1895] 3 Ch. 778; 64 L.J. Ch. 862; 73 L.T. 366.
- (iii.) **Ch. D.**—*Construction—Charity.*—A gift "to the poor and the service of God" held to be a good charitable gift.—*Farquhar v. Darling*, L.R. [1896] 1 Ch. 50; 65 L.J. Ch. 62; 73 L.T. 382; 44 W.R. 75.
- (iv.) **C. A.**—*Construction—Charitable Bequest—Perpetuity.*—Decision of Ch. D. (see Vol. 21, p. 21, vi.) affirmed.—*Jones v. Palmer* (No. 1), L.R. [1895] 2 Ch. 649; 64 L.T. Ch. 695; 73 L.T. 269; 44 W.R. 22.
- (v.) **Ch. D.**—*Construction—Heirlooms—Person Entitled to "Actual" Possession of Realty.*—Chattels bequeathed as heirlooms upon trust to go along with, and be enjoyed by the person for the time being entitled under a settlement to the "actual" possession of, real estate do not vest absolutely in a tenant-in-tail who dies in the lifetime of a tenant-for-life.—*Angerstein v. Angerstein*, L.R. [1895] 3 Ch. 883; 65 L.J. Ch. 57; 73 L.T. 500.
- (vi.) **C. A.**—*Construction—Contingent Gift to Class—Severance—Income—Infant.*—Testator bequeathed leaseholds upon trust for A. for life, and after her death upon trust for her children as she should appoint, and in default of appointment in equal shares, the shares to vest at twenty-one. *Held*, that there had been a severance of the leaseholds from the rest of the estate and that the infant children were therefore entitled to the intermediate income between the death of A. and the vesting of their shares, and that such income was applicable to their maintenance.—*Woodin v. Glass*, 64 L.J. Ch. 501.
- (vii.) **C. A.**—*Construction—Perpetuities—Direction to Settle Shares—Severable Gift.*—A testator gave his residue upon trust for A. for life, with remainder upon trust for her daughters who should attain twenty-one or marry, in equal shares; and he directed that the trustees should stand possessed of the share of any such daughter upon trust for her for life, and after her death upon certain trusts in favour of her

children. *Held*, that the provision for the settlement of the daughters' share was not void for remoteness in the case of a daughter who was living at the death of the testator, and would have been valid though other daughters had been born after the testator's death, to whose shares the provision could not legally apply.—*Dorrell v. Dorrell*, L.R. [1895] 2 Ch. 698; 64 L.J. Ch. 891; 73 L.T. 195; 44 W.R. 100.

- (i.) **C. A.—Construction—Specific Gift—Misdescription.**—Testator gave to A. "£500 debenture stock or shares of the S. company," and to B. "350 ordinary shares in the S. company." He gave to trustees "£5,000 debenture stock or shares of the S. company, 350 ordinary shares in the same company, £1,500 debenture stock or shares in the B. company," &c., "upon trust to continue the same in their present state of investment" or to convert. He had debentures and ordinary shares in the S. company, and debentures in the B. company. There was not in either company any debenture stock, or any shares other than ordinary shares. *Held*, that the gifts of stock and shares were all to be taken to be specific, and that by "debenture stock or shares" the testator must be taken to have meant debentures.—*Jones v. Palmer* (No. 2), L.R. [1895] 2 Ch. 657; 73 L.T. 265.
- (ii.) **P. D.—Probate—Married Woman—No Property passing under Will.**—A married woman made a will, containing only a specific bequest, which lapsed, and no residuary bequest, and appointing an executor. *Held*, that probate must be granted to the executor, and that an application by the husband for administration must be refused.—*In the goods of Dodsworth*, 73 L.T. 315.
- (iii.) **P. D.—Probate—Omission of one of the Christian Names of an Executor.**—The Christian names of an executor called in the will and grant of probate "Frederick" were "Frederick John." It was proved that the Bank of England had objected to transfer stock into the names of the executors because such executor had signed with the initials "F. J." instead of "F." The Court allowed the description in the grant of probate to be altered into "Frederick John M." called in the will "Frederick M."—*In the goods of Honywood*, L.R. [1895] P. 341.
- (iv.) **P. D.—Probate—Letters of Administration Revoked—Foreign Will.**—Deceased died domiciled in Kentucky. The inferior Courts of the State upheld the last will, and letters of administration with the will annexed were granted to the attorney of the widow, the sole executrix. Subsequently the superior Courts of the State upset the will, and the widow sued for revocation of the letters of administration, and for probate of an earlier will. Upon proof of the testamentary capacity of the deceased, the Court granted probate of the earlier will, revoking the letters of administration.—*Newcomb v. Newcomb*, 73 L.T. 317.
- (v.) **P. D.—Probate—Practice—Lodging Documents in Registry.**—The Court refused to hear a motion for the revocation of a grant of probate, and a declaration of the validity of a draft will, where the probate and the draft had not been lodged in the registry.—*In the goods of Riley*, L.R. [1896] P. 9.
- (vi.) **P. D.—Probate—Cessate Grant—Chain of Representation.**—The testatrix appointed two executors and trustees, and gave the surviving trustee or trustees power to appoint new trustees, and directed that every new trustee should become an executor by force of his appointment. The persons named in the will renounced, and letters of administration with the will annexed were granted to two persons who both died without having administered. The Court of Chancery

appointed two trustees of the will, who were both dead, the survivor having appointed his wife sole executrix of his will. She, under the Conveyancing Act, 1891, appointed trustees of the will of the testatrix. *Held*, that probate should be granted to such persons.—*In the goods of Shaw*, 78 L.T. 192.

- (i.) **P. D.**—*Probate—Due Execution not Denied—Destruction of Will—Intention—Right to Begin.*—Where the plaintiffs claimed a decree of intestacy, admitting the due execution of a will propounded by the defendants, but alleging that it had been revoked by destroying it, *held*, that the burden of proof lay on the plaintiffs, and that they must begin.—*Saqui v. Lazarus*, 78 L.T. 194.
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# THE LAW MAGAZINE AND REVIEW.

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No. CCC.—MAY, 1896.

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## Obiter Dicta.

THE Cardinal Archbishops of Baltimore, Armagh, and Westminster, representing their respective flocks in the United States, Ireland, and Great Britain, issued at Easter an important memorandum suggesting the establishment of a permanent Tribunal of Arbitration as a substitute among English-speaking races for War. They say:—

“The establishment of a permanent tribunal, composed, may be, of trusted representatives of each Sovereign nation, with power to nominate judges and umpires according to the nature of the differences that arise, and a common acceptance of general principles defining and limiting the jurisdiction and subject matter of such a tribunal, would create new guarantees for peace that could not fail to influence the whole of Christendom. Such an International Court of Arbitration would form a second line of defence, to be called into requisition only after the ordinary resources of diplomacy had been exhausted. It would at least postpone the outbreak of hostilities until reason and common-sense had formally pronounced their last word.”

This idea is by no means new. In the early part of the 12th century Gerohus propounded an International System of Arbitration; in 1693, Leibnitz proposed the Pope and the Emperor of Germany as joint public arbitrators; in 1713, the Abbé St. Pierre suggested a League of Christendom to settle International disputes; Jeremy Bentham advocated a common tribunal for the same purpose in 1786; Kant, in 1798, proposed a fixed Congress of Nations to meet when called upon; the New York Peace Society, in 1838, proposed a Board of International Arbitration; and James

Mill, in 1842, proposed that delegates from different governments should constitute an International tribunal. But they all came to nought.

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The schemes which approached nearest to the realization of the theory were that formulated by the Powers, forming part of the Armed Neutrality of 1780, that of the Holy Alliance of 1850, which, inspired by the Treaty of Vienna, contemplated the advent of a golden age, under the paternal government of the three contracting Monarchs, and that of the Treaty of Paris of the same year, proposing Congresses of Sovereigns, to arrange without bloodshed the future disputes of Nations. The disastrous results are well known.

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The above earnest proposal of the three Cardinals is deserving of every respect. We sincerely trust that their efforts may prevail, but with the sad record of the past before us, we doubt. The initial difficulty, in formulating any rule for the observance of Nations, is that it lacks a definite sanction to enforce it. Like the Laws of Honour, Rules of International Law are enforced alone by public opinion.

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The Education Bill has, as a whole, been favourably received by the Unionist party; the Radicals severely condemn it. The magnitude and far-reaching consequences of the changes that the Bill will introduce cannot be over-estimated. It will, in fact, revolutionise our elementary educational system. It does not indeed confer any great pecuniary boon on the Voluntary Schools, but it redresses certain grievances in a manner fairly satisfactory. Its tendency, if not its effect, will be to place those schools in a position from which they will be enabled to maintain the competition with the Board Schools.

What is perhaps of not less importance to the ratepayer is that the Bill will help to curb the wasteful expenditure of the School Board, which, cutting thick thongs from other men's leather, has been converting schools of the School Board into educational palaces, after a manner not contemplated by the original Act of Parliament; on the other hand, there are powers for the County Authority to lend money to the managers of Voluntary Schools. Finally there is a clause, which may be described as a kind of supplement to the Conscience Clause, for it not only enables parents to withdraw their children from religious instruction, but it helps them to secure that religious instruction which they may require.

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The Supreme Court of the United States has (January 6th, 1896) affirmed the judgment of the Circuit Court for the Southern District of New York, in the case of *Lew Rosen*, who was indicted for knowingly sending a paper called the "Broadway" containing obscene matter, through the Post.

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The prisoner was indicted under s. 3,893 of the Revised Statutes of the United States, which provides that:—

"Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, . . . . and every article or thing, intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, . . . . are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating, or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of misdemeanour, and shall for

each and every offence be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labour not less than one year nor more than ten years, or both, at the discretion of the court."

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It would be desirable if a similar enactment were passed by the Legislature of this country. \*The increasing tide of indecent literature emanating from abroad, and passing through the channel of our Post Office, should be stayed. The words in the American statute, "shall not be delivered from any Post Office nor by any letter carrier" would exactly meet the difficulty.

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The Supreme Court of New York (December, 1895), in the case of *Carrey v. East Tennessee, Virginia, and Georgia Railroad Company*, gave judgment for the plaintiff, a coloured woman. She had purchased a ticket from the Pennsylvania Railroad Company, entitling her to first-class accommodation, over the route of that Company and connecting lines from New York to Knoxville, Tenn.; one of these connecting lines was the railroad of the defendants. When the train arrived at the boundary of Tennessee in the middle of the night, plaintiff was compelled to leave the first-class car and continue the journey in a car divided into two portions, one portion being for white persons and the other for coloured persons, and the car itself being filthy and dirty.

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The defendants pleaded a Statute of the Tennessee Legislature requiring separate accommodation on railway trains for the white and coloured races; but the Court held that such legislation only applied to trains running from one point to another within the limits of Tennessee, that the plaintiff was an *inter-state* passenger, and the defendants had recognised her as such by authorising the Pennsylvania Railroad Company to sell her the ticket.

The *Times*, under date of February 7th, says:—"The case of the Law student, who appealed against the decision of the Benchers of the Middle Temple on their refusal to call him to the Bar of the Honourable Society, was heard at the House of Lords yesterday, before a Committee of Judges, consisting\* of the Lord Chancellor, Sir Francis Jeune, Mr. Justice Mathew, Mr. Justice Kennedy, Mr. Justice North, and Mr. Justice Romer. Mr. Lawson Walton, Q.C., M.P., and Mr. Montague Lush appeared on behalf of the student; but the Middle Temple was not represented by Counsel. Several Benchers, however, of the Society were present in order to answer any enquiries. The proceedings lasted all day, and at the conclusion of the enquiry, the Judges dismissed the appeal of the student and upheld the decision of the Benchers."

Appeals by students are not uncommon. Whenever an Inn of Court has good reasons for deeming that a student belonging to its body is not a desirable person to call to the Bar, it may refuse to call him. The student, however, has an appeal to the Judges, in their capacity of Visitors of the Inns of Court. The method is simple. On the refusal of the Inn to call him, the student writes a more or less formal letter to the Judges by way of appeal, setting out the facts of his case and desiring their decision. The Judges appoint a place and day for hearing the appeal. Formerly the appeal was always heard at Serjeants' Inn. On the occasion above mentioned it was heard at the House of Lords; on a previous occasion it was heard in a room in the Royal Courts of Justice. On the last occasion Counsel appeared in robes. On the previous occasion they did not.

An account of the case of Daniel Whittle Harvey, Esq., M.P., who similarly appealed to the Judges in 1833, will be found in this *Magazine* (1834), Vol. XI., p. 94, and Vol. XII.,

p. 373. In that case the certificate, forwarded to the Benchers, was to the following effect:—" Upon the matters laid before the Judges by the Masters of the Bench of the Inner Temple, and the explanations and arguments of the learned counsel for the Petitioner, the Judges are of opinion that the Masters of the Bench have acted with due regard to the honour of the Bar, and the interests of society in refusing to call the Petitioner to the Bar, and they therefore dismiss the Petition."

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The Supreme Court of Michigan (December 24th, 1895), in the case of *White v. Grand Rapids and Indiana Railroad Company*, decided that it is the duty of a conductor to give a passenger upon a railway train some evidence that he has paid his fare, and a passenger cannot be required to give up his ticket, unless a check or some evidence of the fact that he has paid his fare to a station indicated is given him; also that it is the duty of a passenger to produce such evidence upon demand of the conductor, and when, in consequence of a refusal to produce it, he is ejected from a train, he cannot recover damages. A person cannot maintain an action for damages who allows himself to be ejected from a train solely with the object of bringing such action.

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"If we were to devote our attention to the antics of Judges," says the *American Law Review*, "we should have no space in these pages for anything else. One of the latest is the caricature of justice made by a Judge at Wichita, Kansas, in committing an expert witness in a prosecution under the prohibitory liquor law, for contempt of Court because he refused to taste of some beer which had been uncorked for him in the Court, so as to testify whether it was beer or whether it was something else under which name it had been sold."

"Tennessee," says the *Chicago Legal News*, "presents a spectacle disgraceful alike to the State and its judiciary. The Chief Justice of the Supreme Court of that State, resenting a criticism upon one of his decisions made by an attorney in a public print, took the law into his own hands and shot the attorney." Fortunately for our civilization, such an occurrence is almost unprecedented in the annals of the judiciary.

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The *Law Times* (February 29th) points out that the only essay on the subject of Suzerainty, in English or other language, is one entitled "Suzerainty: Mediæval and Modern," by Mr. Charles Stubbs, in the *Law Magazine and Review*, of May, 1882, where the subject is collected and digested.

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Mrs. Clara Shortridge Foltz, the first woman admitted to the Hastings College of Law, California, after a long contest before the Courts, has lately been admitted to the Bar of New York.

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Referring to the note in our February number concerning the admittance of women as Masons, Judge Bradwell, of Chicago, argues that women were admitted as Masons in England from the following language of one of the York Rolls: "Hee or shee that is to be made Mason shall lay their hands on" the "booke."

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The presentation of a Memorial, signed by 2,088 members of the Senate of the University of Cambridge, respecting the admission of women to University Degrees and the proposal of the Council of the Senate to appoint a Syndicate to consider this question has caused very considerable dissent on the part of many prominent members of that University. The admission of women to membership of



the University or to any of the Degrees which are conferred on members of the University would be nothing less than a revolution and would entail consequences injurious to the University as a place of education for men.

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The case of the *Oriente* (64 L.J. (P.D. & A.) 32), on appeal is important as well for drawing attention to the former decisions and legislation upon maritime lien, as for noting a distinction as to the disbursements concerning which a master is entitled to a lien under sect. 1 of the Merchant Shipping Act, 1889, repealed and substantially re-enacted by sect. 167 (2) of the Merchant Shipping Act, 1894 (Stat. 57 & 58 Vict., c. 60). The decision in *Bristow v. Whitmore* (9 H. L. 391), became of less importance upon this subject owing to the passing of the Admiralty Court Act of 1861, which was held by Dr. Lushington in the *Mary Ann* (1 A. & E. 8), to give the master a maritime lien for his disbursements. After a lapse, however, of twenty years this decision was overruled by the House of Lords in the *Sara* (58 L.J. (P.D. & A.) 57; L.R. 14 App. Cas. 209).

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The Merchant Shipping Act, 1889, was shortly afterwards passed for the express purpose of creating such a lien. All proper maritime liens must have their root in the owner's personal liability. The only exception to this rule is in the case of wages, an exception founded, obviously founded on public policy (*The Feronia*, 2 A. & E. 65). By the section in question "the master of a ship, and every person lawfully acting as master of a ship, by reason of the decease or incapacity from illness of the master of the ship, shall so far as the case permits, have the same rights, liens and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages."

## I.—THE BOUNDARIES OF BRITISH GUIANA AND VENEZUELA.

### 1. *Subject Defined.*

IN this Article I propose to give an impartial statement of the dispute, between the British and the Venezuelan Governments, as to the boundary between British Guiana and Venezuela in South America. The documents upon which I intend chiefly to rely are the two Parliamentary Blue Books published by the British Government in March last, and the Parliamentary Blue Book published in February last. I understand that the Venezuelan Government have published a statement of their case at Washington, but I have, unfortunately, not been able to see it. I do not, however, believe that this statement can have any new, or material, fact, which is not contained in the recently published Blue Books, on a dispute which has been in existence for more than fifty years.

### 2. *History and Geography of Spanish Guiana.*

In the end of the 16th century, the Spaniards explored various portions of South America for the purpose of colonizing them, and had made settlements in the island of Trinidad, near the mouth of the Orinoco, and on the mainland of South America. In 1676, the Council of War and Council of the Indies of the King of Spain wrote to the King that the States of the Provinces of Holland and West Frisia possessed the greater part of the South American coast, from Trinidad to the River Amazon, and that the Dutch intended to found a colony, at Cape Orange, between Surinam and the River Amazon. On the 14th of April, 1676, the King commanded the Council to take steps to prevent the establishment of the proposed colony.

As early as 1737, the Spaniards knew that the Dutch held the territory, at least, along the shore, from the River Orinoco to Surinam. At this time, the Spaniards had troubles with Portugal as to Brazil in regard to alleged Portuguese usurpations in the Province of Guiana, with the French on the Mississippi, and the Dutch on the Orinoco. They were afraid that two Dutch forts, built between the Rivers Surinam and Cupenam, were intended to enable the Dutch to approach the mouths of the Orinoco, and possess the immense territories there, and also get control of the mouths and the trade of the river. About this time, there was a proposal that Guiana should be made an independent Spanish Province, from the Orinoco to the River Essequibo, and placed under the government of the Carácas Company, or be settled with Cathalans. As a matter of fact, Spain claimed all this region, and the Dutch had merely settlements along the coast of the Atlantic. The Dutch settlements were Surinam, Berbice and Demerara. The French had the island of Cayenne and a settlement on *terra firma*.

In 1753, the Spaniards alleged that the Dutch influenced the savage Caribs, on the banks of the Orinoco, to attack the Spanish missions in Guiana. The Spanish missions in Guiana did very little good. In the middle of last century, the Dutch had a colony on the River Essequibo, and had some of the gold and silver mines of the Province of Guiana. They obtained licences from the Commandant of the Province of Guiana for their fishermen to fish for turtle on the River Orinoco. About this time, the Dutch had a military post, but no fort, at Moruca.

In 1758, the Governor of Carácas states that the Province of Guiana comprised the whole of the Orinoco. In the same year, the view of the Spanish Council of the Indies, in discussing the affairs of the Province of Guiana, was that the Dutch had no rights on the Orinoco in 1648,

at the time of the Treaty of Munster, and that the Dutch had acquired no right in those territories by any occasional or special concessions of the Commandant of Guiana.

In 1762, the Governor of Cumaná and Guiana asserts that the Province of Guiana was little better than a desert.

In 1763 the Governor of Cumaná lays down the limits of the Spanish Province of Guiana thus: "On the east, all the coast on which the Dutch colonies of Essequibo, Berbice, and Demerara, Corentine, and Surinam, and more to the windward Cayenne, belonging to the French, are situated; on the north, the banks of the Orinoco, which, separating it from the Provinces of Cumaná, Barcelona, Carácas, Barimas, Santa Fé, and Popayan, forms a half-circle, returning to the east in the direction of the head waters of the Orinoco in the Lake of Parima, as will be seen in the general map of the said provinces and river; on the south, the dominions of our most faithful King in Brazil, the limits of which, however, are entirely unknown, and the said Province of Guiana, as much of it as is contained in the interior."

In 1770 the Commandant Centurion of Guiana reported to the King of Spain that the Dutch had not then, and never had, been in possession of the rivers or of the creeks which flow into the sea from the Essequibo to the Orinoco, and that they had been allowed to have a guard, on the east bank of the Moruca, for preventing the desertion of their slaves." He sent documents and maps in support of his report. He proposed that a fort should be built on Point Barima, to the windward of the ships' or grand mouth of the River Orinoco, and thus have an important look-out tower on the sea, as a sentinel at the River Barima, the principal avenue of the colony of Essequibo to the Orinoco, and an effective check against the Dutch in the direction of the Orinoco.

In 1773, in a report to the King of Spain, the Commandant Centurion of the Spanish Province of Guiana stated that the boundaries of his Province are as follows:—"On the north, the Lower Orinoco, the southern boundary of the Provinces of Cumaná and Carácas; on the east, the Atlantic Ocean; on the south, the great river of the Amazons; and on the west, the Rio Negro, the Canon of Cassiquiari, and the Upper Orinoco the boundary of the eastern and unexplored part of the kingdom of Santa Fé. On the confines, or limits, of this vast Province the French and the Dutch have occupied the whole sea coast with their colonies—the French in Cayenne, round the mouth of the Amazon, and the Dutch in Surinam, Berbice, and Essequibo, 55 or 60 leagues from the great mouth of the Orinoco." Angostura, the capital of the Province, was 83 leagues from the sea. On the south bank of the River Orinoco was the castle of St. Francis of Assisi. In 1762, the King of Spain declared the Province of Guiana to be independent of the Province of Cumaná, and to be subordinate to the Viceroy of Santa Fé.

### 3. *History and Geography of Venezuelan Guiana.*

In the beginning of the present century, the subjects of Spain in South America became dissatisfied with the government of the mother country, and declared themselves independent, and formed themselves into the Colombian Republic.

The Republic of Venezuela claims to have succeeded to Spain, to the extent of the Captaincy-General of Venezuela, by Treaty of Recognition, at Madrid, in 1845. That Treaty does not describe the Spanish Province of Guiana by express limits. The Venezuelans assert that, in 1810, the Essequibo was the limit between the Spanish Province of Guiana and Holland, and that the same limit describes the

boundary between Venezuela and British Guiana. In 1822, the Government of Colombia, the predecessor of Venezuela, claimed the Essequibo as belonging to the Republic.

By the 13th Article of the Venezuelan Constitution, it is laid down as one of its bases, "that the States bind themselves not to alienate to a foreign power any portion of their territory."

#### 4. *History and Geography of Dutch Guiana.*

The Dutch made their first settlement in South America at the Mazaruni. In 1580, they navigated the River Orinoco, and made some settlements on such parts of the country as were not occupied by the Spaniards. Next year, the States-General of Holland granted to certain individuals the exclusive right to trade to those settlements. In 1621, they granted to some Dutch merchants, under the title of the Dutch West India Company, an exclusive right to all their African and American commerce, and the right of governing any new colonies, which they might acquire.

On the 13th of January, 1648, Philip IV., King of Spain, recognized, by the Treaty of Munster, the United Provinces of the Netherlands as Independent States; and, by an additional article, on the 4th of February, 1648, confirmed their possessions then held and occupied in foreign parts. The Treaty of Munster specially included the colonies of the Dutch West India Company; but did not define their extent and limitations. Then, in 1714, by the Treaty of Utrecht, the Queen of Great Britain and Ireland ratified the territories of the King of Spain in his American territories as at the death of Charles II.

In the 16th century, the Dutch and other Europeans swarmed into Guiana in the hope of getting gold. The Dutch had three colonies in South America—their first colony was that of Essequibo, situated near the river of that name, and their second colony was Berbice. About

1740, some colonists of Essequibo took possession of the adjacent banks of the Demerara and founded a third colony. T. W. Norrie, an English geographer, in his "Routier for the Coast of Guiana," printed in 1828, lays down that "British Guiana extended from the River Couñranie to the north-west up to the Essequibo." He adds: "This was the real extent of the Colony arranged between the Spaniards and Dutch by the Treaty of Munster in 1648, and which has never been revoked since then; but the owners of English and Dutch plantations, having formed establishments to the north of these boundaries, and settled themselves on the banks of the Pomeroon, and beyond Cape Nassau, the boundaries claimed by the English now extend to the meridian of Cape Barima, although that, in reality, constitutes what ought to be called Spanish or Colombian Guiana."

In 1758, the dominion of the States-General extended to the ships' or great mouth of the Orinoco, and the Dutch had had a colony of Essequibo, and a post on the River Monica. As far back as 1637, the Dutch united with the Carib Indians from Amacura, Essequibo, and Berbice, and took, sacked, and burned Santo Tomé de la Guiana. They had, then, large settlements in those districts. All along the coast, from the River Amazon to the River Orinoco, they had towns here and there, and large and valuable settlements or plantations. On the River Surinam, they had immense plantations, and carried on agriculture and collected much produce, and they had the town of Calandia, on the River Pomeroon, surrounded with large and rich plantations.

The Dutch colonies of Demerara, Essequibo, and Berbice, were formally ceded to Great Britain by the Sovereign Prince of the Netherlands, under an additional Article to a Convention in 1814, between the King of Great Britain and Ireland and the Prince of the United Netherlands.

### 5. *History and Geography of British Guiana.*

Even in 1833, the Rivers of Essequibo and Berbice were little known to the British, and were, then, unsurveyed by the Admiralty. But, in 1827, the Lieutenant-Governor of Demerara sent to Viscount Godrich a Memorandum as to the colony of Demerara and Essequibo, and a sketch of the boundaries, rivers, and principal divisions of it. In this Memorandum the boundaries of the colony are laid down thus: on the north, the sea coast from the mouth of the Abary to Cape Barima, near the mouth of the Orinoco; on the west, a line running north and south from Cape Barima into the interior; on the south, the Portuguese frontier, in that district which is called the Government of Rio Negro, and which may be generally defined by a line running east and west along the ridge, which Humbolt called the Cordillera of Parima, separating the two systems of rivers flowing respectively northwards into the valleys of the Orinoco and Essequibo, and southward into that of the Amazons; on the east, the Abary River, from its mouth, so far as its course extends, and thence in a southerly direction to the Portuguese frontier. On the east, the boundary line is on the borders of the British colony of Berbice, which has the River Corentin for its eastern boundary, and which, with Demerara and Essequibo, formed British Guiana in 1827.

In 1836, Governor Porter of British Guiana wrote to the Venezuelan Government that they ought to place a lighthouse on Barima Point. His letter did not come to the knowledge of the British Government at home till 1842. Of course, the Venezuelan Government seized on this communication as an admission by Britain that Barima Point belonged to Venezuela; and the British Home Government denied that they were bound by the Governor's communication.



In 1839, Mr. Schomburgk, under the direction of the Royal Geographical Society, with the aid of Her Majesty's Government, surveyed British Guiana, and made a report thereon. Mr. Schomburgk's survey was based on the hypothesis that the Orinoco was the western boundary of the Dutch possessions, which were ceded in South America to Britain, and that Barima Point had been fortified by the Dutch. In 1841, Mr. Schomburgk laid down certain marks on his route, and drew up a plan as indicative of what the boundaries should be as between Britain and the Republic of Venezuela. In the same year, the latter complained to the British Government of his survey, and of the marks which he had laid down, and proposed a convention to fix the boundaries between the two countries. On the 21st of October, 1841, Lord Aberdeen wrote to Senor Fortique, Minister Plenipotentiary of the Republic of Venezuela, at London, that the marks were not intended to indicate British property or dominion, but lines for promoting the settlement of the boundaries. On the 31st of January, 1842, Lord Aberdeen wrote to Señor Fortique "that, in order to meet the wishes of the Government of Venezuela, Her Majesty's Government will send instructions to the Governor of British Guiana directing him to remove the posts which have been placed by Mr. Schomburgk near the Orinoco." His lordship concludes thus: "Her Majesty's Government must not be understood to abandon any portion of the rights of Great Britain over the territory which was formerly held by the Dutch in Guiana." On the 9th of February, 1842, Señor Fortique wrote to Lord Aberdeen to thank him for the frankness and cordiality of his letter of the 31st of the preceding month. He assured his lordship that the Venezuelan Government wished "for a definitive settlement of the boundary line of the territory which shall be found to belong to Great Britain as legitimately possessed by the Dutch."

On the 23rd of October, 1886, Lord Iddesleigh forwarded to Mr. St. John a Notice, published in the *London Gazette* of the 22nd, as to the territory claimed by Her Majesty's Government as part of the Colony of British Guiana. This notice was to the effect that the British Government would not recognise any rights in the land comprehended within the disputed territory between British Guiana and Venezuela. In 1888, this territory was proclaimed by the Governor of British Guiana to be British territory.

#### 6. *Negotiations between Britain and Venezuela.*

On the 31st of January, 1844, Señor Fortique wrote to Lord Aberdeen, and urged him to take steps to commence a negotiation for a Boundary Treaty. He asserts that, in the end of the 16th century, "the Spaniards possessed the Orinoco and all the contiguous country; that they already occupied the Rivers Barima, Moroco, and Pomeroon, and that their domination extended as far as the Essequibo." He asserts that Spain never gave any sanction to the usurpations of the Dutch, after the Treaty of Munster, in 1648; and that the principle of prescription does not apply as between nations. To this communication Lord Aberdeen sent an answer to Señor Fortique on the 30th of March, 1844. He denies Señor Fortique's assertions that the Essequibo had been held to be the dividing line between the two countries, and that the territory between that river and the Orinoco was considered by the world as the exclusive property of Spain. He then proceeds to state, "what concessions from her extreme claim Great Britain, out of friendly regard to Venezuela, and from a desire to prevent the occurrence of any serious differences, is willing to admit."

The discussion of the dispute appears to have been suspended between the Governments of Britain and Venezuela till 1850. But, on the 2nd of April, 1850, Mr.

Wilson, Chargé d'Affairs at Carácas, wrote to Lord Palmerston, the British Foreign Minister, that an unscrupulous party, in Venezuela, were having recourse to an old political artifice of imputing to Britain the design of seizing upon the Province of Venezuelan Guiana, and that he had given a flat denial to the reports that Britain had any such design. On the 15th of June, 1850, Lord Palmerston wrote to Mr. Wilson to call the serious attention of the President's Government that, "whilst, on the one hand, Her Majesty's Government has no intention of occupying or encroaching upon the disputed territory, they will not, on the other hand, view with indifference aggressions on that territory by Venezuela." On the 30th of August, his lordship authorised Mr. Wilson to say, in answer to any application by the Venezuelan Government, for a renewal of the offer of compromise of 1844, that as the offer was not accepted, "it will not be revived by Her Majesty's Government." On the 18th of November, 1850, Mr. Wilson asked Señor Lecuna, Foreign Minister of Venezuela, for a reciprocal declaration from the Venezuelan Government that they did not intend to encroach on the territory claimed by both Governments. On the 20th of December, 1850, M. Lecuna wrote to Mr. Wilson, Her Majesty's Chargé d'Affairs at Carácas, as follows: "The Government has no difficulty in replying that Venezuela has no intention of occupying or encroaching upon any part of the territory, the dominion of which is in dispute, and that it will not view with indifference that Great Britain shall act otherwise."

The correspondence ceased till the end of 1857, when, on the 16th of December, the Earl of Clarendon, the British Foreign Minister, wrote to Mr. Bingham at Carácas, in these words: "It is not impossible that the various questions which have arisen, and which are likely to arise in connection with the gold discoveries may call the atten-

tion of the Venezuelan Government to the advantage which might result from a final settlement of the boundary between the territory of British Guiana and that of Venezuela."

In 1858, an attempt was made by Great Britain to arrange a Treaty for the settlement of the disputed territory; but the unsettled and revolutionary condition of Venezuela utterly prevented all negotiations.

No further negotiations or communications appear to have taken place between Britain and Venezuela for nearly 7 years. On the 9th of October, 1865, Mr. Edwardes, at Carácas, wrote to Lord Russell that General Guzman, Foreign Minister of Venezuela, had recently spoken to him as to certain encroachments alleged to have been made on Spanish Guiana, and that, when he had mastered the subject, he was to communicate with him in regard to it. He stated that the General was no longer at the Venezuelan Foreign Office.

Then, 10 years pass away, and numerous communications take place between the British and Venezuelan officials in regard to the seizure and trial of Thomas Ganet, for a murder perpetrated by him at Amacura, in territory claimed by Britain and Venezuela.

Nearly a year and a-half elapsed, and the question of the disputed territory is taken up by Señor Calcaño, Foreign Minister of Venezuela, on the 14th of November, 1876, when he wrote to Lord Derby, the British Foreign Minister, who received this letter on the 26th of December. He explains that his object in writing is to settle pending disputes, and preserve the peace and friendship of the two countries.

On the 13th of February, 1877, Señor de Rojas, Minister Resident of the Republic of Venezuela, at the Court of St. James's, wrote to Lord Derby that he had been instructed by the Venezuelan Government to call his lordship's attention to the Guiana boundary question. He proposed

"a settlement of the dispute, in an amicable manner, either by a boundary being fixed, on the basis of titles, maps, documents, and proofs which either party shall produce, from Spanish and Dutch authorities, up to the time when the Venezuelan and British Governments intervened, or came on the scene; or by a conventional line, fixed by mutual accord between the Governments of Venezuela and Great Britain, after a careful and friendly consideration of the case, keeping in view the documents presented by both parties, solely with the object of reconciling their mutual interests, and to fix a boundary as equitable as possible." On the 16th of February, 1877, Lord Derby wrote to Señor Calcaño "that Her Majesty's Government will always be happy to receive, and will give the most earnest attention to any representations which the Venezuelan Government may think fit to address to them, either through Señor de Rojas, or through Mr. Middleton, Her Majesty's Minister Resident at Carácas."

No such representations were made for more than two years. Then, on the 19th of May, 1879, Señor de Rojas wrote to Lord Salisbury and repeated his offer of a settlement of the dispute on a strictly legal basis; or by a conventional boundary, agreed upon by both parties, for their mutual accommodation, and for the protection of their respective interests.

On the 10th of January, 1880, Lord Salisbury wrote to Señor de Rojas that the settlement of the Venezuelan boundary question, "on the grounds of strict right would involve so many intricate questions connected with the original discovery and settlement of the country, and subsequent conquests, cessions, and treaties, that it would be very unlikely to lead to a satisfactory solution of the question," and that Her Majesty's Government would, therefore, prefer a conventional boundary. He then stated "The boundary which Her Majesty's Government claim, in

virtue of ancient Treaties with the aboriginal tribes, and of subsequent cessions from Holland ;" and, that, if a satisfactory settlement was to be made, both Governments must make considerable concessions to each other; and that, if the Venezuelan Government was prepared to act in the spirit of conciliation, Her Majesty's Government was ready and anxious to do the same.

On the 12th of April, 1880, Señor de Rojas wrote from Paris to Lord Salisbury that his Government had authorised him to abandon the ground of strict right in the dispute, and to agree to a conventional boundary.

On the 12th of February, 1881, Lord Granville wrote to Señor de Rojas that the British Government were unable to accept the mouth of the Moroco as the boundary on the coast; and that, nevertheless, they were ready to consider any conventional boundary which his Government might propose to commence at a more northerly point on the coast than the Moroco, and would be glad to consider the views of the Venezuelan Government as to a general line of frontier as a basis for negotiation. On the 21st of February, 1881, Señor de Rojas wrote to Lord Granville that an "immense territory now occupied by Her Britannic Majesty's Government within those limits," *i.e.*, beginning at the mouth of the River Essequibo, "belongs to Venezuela." He then stated the maximum concession which the Venezuelan Government can make by way of friendly arrangement. He stated that he had received instructions from his Government to urge upon the Government of Her Britannic Majesty to submit the dispute to an Arbitrator to be mutually chosen by both parties. On the 15th of September, 1881, Lord Granville wrote to Señor de Rojas, and sent him a Memorandum for a new boundary line, "which they were prepared to accept, and which will leave to Venezuela the complete control of the mouth of the Orinoco, whilst it will furnish a convenient boundary in

the interior, conforming to the natural features of the country."

After several letters had passed between Lord Granville and Señor de Rojas as to delay in answering his lordship's proposals of the 15th of September, 1881, Lord Granville wrote to Colonel Mansfield, British Minister Resident at Carácas, on the 1st of February, 1883, to instruct him to call the attention of the Venezuelan Government to the delay which had occurred, and to press for an expression of their views, with a view to the settlement of the boundary dispute. He also wrote, on the same day, to Señor de Rojas for an answer to his proposals. Further delay occurred, and in the interval Señor de Rojas was recalled to Venezuela; and other questions, as to differential duties imposed on imports from British Guiana, and claims by British creditors of the Republic, had arisen. At last, on the 22nd of November, 1883, Colonel Mansfield wrote to Lord Granville, with a copy of a translation of a letter to him, from Señor Seijas, Carácas, stating that the Venezuelan Government were not in a position to accredit a Minister to London.

On the 29th of February, 1884, Lord Granville wrote to Colonel Mansfield that he had considered the Venezuelan Government's proposal for Arbitration as to the disputed territory, and instructed him to ask the Venezuelan Government to devise some other solution for bringing this long-pending dispute to a satisfactory issue.

On the 24th of December, 1884, Lord Granville wrote to General Blanco that the British Government's proposals were not for a cession of any part of the Venezuelan territory, but for a settlement of the proper limits between Venezuela and the colony of British Guiana. On the 30th of December, 1884, General Blanco wrote to Lord Granville as to the powers of the Venezuelan Government as to the territory of his country. He proposed to refer

the question "to a legal tribunal composed of persons chosen by the parties." On the 13th of February, 1885, Lord Granville wrote to General Blanco that his proposal to settle the disputed boundary, between British Guiana and Venezuela, by a Commission of Jurists nominated by the British and Venezuelan Governments, and whose decision should be final, could not be accepted by the British Government, and that Her Majesty's Government were not prepared to depart from the arrangement proposed by the Venezuelan Government in 1877, and accepted by Her Majesty's Government, to decide the question by adopting a conventional boundary fixed by mutual accord between the two Governments. Then there followed discussions as to the substitution of "powers" for "persons," in the arbitration clause of the proposed Draft Commercial and Maritime Treaty, and as to making that clause sufficiently extensive to cover not only disputes arising under the Treaty, but to all disputes between the two Governments. Lord Granville agreed to all the important alterations proposed by General Blanco as to the arbitration clause. He, beyond all question, agreed to include the disputed boundary question within the terms of that clause. A change of British Government took place, and on the 27th of July, 1885, Lord Salisbury, Foreign Secretary and Prime Minister, wrote to General Blanco that "Her Majesty's Government are unable to concur in the assent given by their predecessors in office to the general arbitration article proposed by Venezuela," or to another important stipulation, in the commercial part of the Treaty. His lordship objected to extend the operation of the arbitration clause beyond the Commercial Treaty. Thereupon, General Blanco insists upon both matters being comprehended in the Treaty, and the negotiations were broken off.

On the 17th of December, 1885, General Blanco wrote to Lord Salisbury that he had received instructions in con-



firmation of his previous orders, and respectfully asked for the performance of the promises made by the previous administration on behalf of Her Majesty.

On the 7th of June, 1886, Lord Rosebery, British Foreign Secretary, wrote to Mr. F. R. St. John, Chargé d'Affairs at Carácas, blaming the Venezuelan Government for interposing difficulties in the settlement of the disputed boundary, and instructing him to inform the Venezuelan Government that Her Majesty's Government were to give instructions to proceed to define the boundary of the British possessions in Guiana, in accordance with Lord Granville's proposed boundary line, of the 15th of September, 1881; and that Her Majesty's Government reserved the right to claim a more westerly boundary than was thus indicated. He also stated that the British Government were ready to make concessions to the Venezuelan Government as to a portion of the disputed territory beyond the line now proposed to be marked out, provided the Venezuelan Government recognised the line thus indicated. On the 19th of June, 1886, General Blanco wrote to Lord Rosebery that he was about to return to Venezuela, and that he would be glad to get a settlement of the matters for which he had been sent to England in 1884. On the 23rd of June, Lord Rosebery wrote a private note to General Blanco that he would like, if possible, to discuss pending disputes with him with a view to a settlement. On the 25th of June, he wrote Mr. St. John that he had telegraphed to him to suspend action of his despatch of the 7th till further orders, and that General Blanco was in London and in communication with him on the subject. On the 20th of July, 1886, Lord Rosebery wrote to General Blanco, and sent him a Memorandum of bases of negotiation for a settlement of all pending disputes. According to the Memorandum "the two Governments should agree to consider the territory between the

boundary-lines respectively proposed in the 8th paragraph of Señor de Rojas' note of the 21st February, 1881, and in Lord Granville's note of the 15th September, 1881, as the territory in dispute between the two countries, and that a boundary-line should be traced within the limits of this territory, either by an arbitrator, or by a joint commission, on the basis of an equal division of this territory, due regard being paid to natural boundaries. On the 6th of July Mr. St. John, not having then received Lord Rosebery's telegram, wrote to Lord Rosebery that he had carried out his lordship's instructions of the 7th of June. On the 28th of July, 1886, General Blanco wrote to Lord Rosebery as to sundry complaints made by his Government on renewed acts of violation of Venezuelan territory committed by English authorities.

In 1887, a suspension of diplomatic relations between the two Governments followed the breakdown of the negotiations in 1886, and the notice of annexation of the districts of Amacura, Barima and Guiana by the British Government on the 22nd of October, 1886. On the 8th of January, 1887, Señor Urbaneja, Foreign Minister of Venezuela, wrote to the British Chargé d'Affairs, at Carácas, that Venezuela had never admitted, and would never admit, that British Guiana bordered on the Orinoco. The Venezuelan Government, then, insisted on evacuation of the newly annexed territory within the disputed boundary, between the Orinoco and the Pomeroon Rivers, or arbitration, or a rupture of diplomatic relations. On the 26th of January, 1887, Señor Urbaneja wrote to Mr. St. John, "that Venezuela continues to be disposed to end the controversy by recourse to arbitration, which is the only way compatible with her existing constitution." As Mr. St. John was not authorised to agree to evacuation or arbitration, diplomatic relations were, on the 21st of January, 1887, suspended between the two Governments. Soon afterwards, by an arrangement

between the British Government and the German Government, the persons and property of British subjects, in Venezuela, were placed under the protection of the German Representative at Carácas.

On the 10th of January, 1890, Señor Urbaneja, Venezuelan Envoy Extraordinary and Minister Plenipotentiary in France, wrote to Lord Salisbury that he was authorised to renew diplomatic relations between his Government and Her Britannic Majesty. A correspondence thereupon ensued, between him and the officials of the British Foreign Office, as to the conditions upon which diplomatic relations could be re-established between them. It ended in no successful result; for the British Government insisted on excluding the territory comprehended under the Notice of the 22nd of October, 1886, and would not agree to an arbitration to cover the whole of the disputed territory, and refused to recognise Barima Point as Venezuelan territory. Señor Urbaneja, however, was informed, on the 19th of March, 1890, that the British Government were prepared to abandon a portion of their extreme claim and to agree to an arbitration as thus restricted. On the 24th of June, 1890, the British proposals for a limited arbitration were rejected by the Venezuelan Government, and other proposals were made for the settlement of the pending questions. The new proposals consisted of a declaration as to the disputed territory; the appointment of a mixed commission by the two Governments; the settlement of the boundary dispute by the mixed commission; and, if necessary, the final settlement of the boundary was to be made by two arbiters, to be chosen by the two Governments, and by one arbiter to be chosen by the said two arbiters. On the 29th of July, 1890, the conditions of the Venezuelan Representative, for a resumption of diplomatic relations, were declined by the British Government.

In February, 1892, there were fears of a collision on the right bank of the Cuyuni, between the British Colonial and Venezuelan Police forces, and a communication was sent to the Venezuelan Government by the British Government, through the German representative at Carácas, that, if any Venezuelan aggression took place on the right bank of the Cuyuni, grave complications would arise. The matter which had given rise to these fears arose from certain incidents which happened in the Uruan district in the November previously, and which are not yet settled between the two Governments. The British Government also communicated to the German Government, for the information of the Venezuelan Government, that they were "ready to re-open the discussion of the boundary question, with a duly accredited representative of the Venezuelan Government, empowered to make a reasonable proposal."

More than a year elapsed, and then, on the 23rd of May, 1893, Señor Michelena, Confidential Agent of the Venezuelan Government, commenced a correspondence with Lord Rosebery, British Foreign Minister, for the settlement of pending difficulties and the re-establishment of diplomatic relations between the two countries. His proposals were practically the same as those of Señor Urbaneja in 1886, and were rejected by Lord Rosebery.

On the 3rd of July, 1893, Lord Rosebery wrote to Señor Michelena, the Venezuelan representative, that "Her Majesty's Government consider that it is quite impossible that they should consent to revert to the *status quo* of 1850, and evacuate what has, for some years, constituted an integral part of British Guiana." On the 31st of July, Señor Michelena wrote to Lord Rosebery that his lordship's statements destroyed the basis of the proposed convention, and that discussion was almost useless. On the 29th of September, Señor Michelena wrote to Lord Rosebery that an arbitration of the whole question

was the only one which will satisfy the rights of both parties. On the 6th of October, Señor Michelena wrote to his lordship, and threw the blame of the failure of negotiations, for an amicable settlement, upon the British Government, and for all the consequences which might ensue in enabling Venezuela to provide for her legitimate defence. On the 12th of October, Lord Rosebery laconically acknowledged receipt of this war-like epistle.

*7. Correspondence between the Governments of Great Britain and the United States of America.*

On the 8th of February, 1887, Mr. Phelps, the Ambassador of the United States of America at St. James's, wrote to Lord Salisbury that he was instructed to offer the good offices of his Government to his lordship for the settlement of the disputed boundary between the British and Venezuelan Governments. On the 22nd of February, his lordship wrote to Mr. Phelps that General Blanco's attitude rendered it impossible for Her Majesty's Government to submit the question to the arbitration of any third Power. Other communications passed between the Governments of Great Britain and the United States, in 1890, 1891 and 1892, in regard to the necessary arrangements to be made for a restoration of diplomatic relations and an amicable settlement of all pending disputes between the two Governments of Great Britain and Venezuela. On the 25th of January, 1895, Mr. Bayard, the Ambassador of the United States of America, spoke to Lord Kimberley on the same subject; and his lordship promised to explain the position of affairs, and to show him a map setting out the points in dispute. On the 20th of February, Lord Kimberley had another meeting with Mr. Bayard and read to him a memorandum on the Venezuelan boundary question, and showed him the promised map. His lordship also told Mr. Bayard that, although Her Majesty's Government were

ready to go to arbitration as to a certain portion of the territory, which he pointed out to him on the map, they could not consent to any departure from the Schomburgk line.

On the 20th of July, 1895, Mr. Olney, Secretary of State for the United States of America, wrote to Mr. Bayard a long despatch as to the Venezuelan boundary dispute, and directed him to communicate with Lord Salisbury on the subject. Accordingly, on the 7th of August, Mr. Bayard communicated Mr. Olney's despatch to Lord Salisbury. Mr. Olney concludes his despatch by directing Mr. Bayard to "call for a definite decision upon the point whether Great Britain will consent, or will decline to submit the Venezuelan boundary question in its entirety to impartial arbitration," and states that, if the President of the United States should not receive a favourable answer before the assembling of Congress at Washington, the future relations between the United States of America and Great Britain would be greatly embarrassed. To this communication Lord Salisbury wrote two despatches on the 26th of November, 1895, to Sir J. Pauncefoot, the British Ambassador at Washington. In one of them, he discussed the political, and in the other the historical aspects of the dispute. In the former, he states that the Monroe doctrine did not apply to the matter; and, in the other, he gave a brief history of the stages through which the dispute had passed, and of the principles applicable thereto. These two despatches were communicated to the Secretary of the United States on the 7th of December, and before the meeting of Congress, and the warlike speech of the President.

On the 3rd of February, 1896, Mr. Bayard wrote to Lord Salisbury that he had been instructed to make known to his lordship that a Commission, to investigate and report upon the true divisional line between the Republic of

Venezuela and British Guiana had, under the authority of the American Congress, been appointed by the President of the United States, and was in session. He informed him that the duty of the Commission was confined to a diligent and careful ascertainment of the facts touching the disputed territory. He, therefore, intimated that the Commission would be grateful to his lordship for such assistance and friendly co-operation and aid as the Governments of Great Britain and Venezuela might give them in the shape of documentary proof, historical narrative, unpublished archives, or other evidence which Her Majesty's Government can give. On the 7th of February, Lord Salisbury wrote to Mr. Bayard that Her Majesty's Government were engaged in preparing the documents, as to the Venezuelan boundary question, for presentation to Parliament, and that, when the collection was completed and ready for the press, "Her Majesty's Government will have great pleasure in forwarding advance copies to your Excellency." On the 10th of February, Mr. Bayard returned thanks to Lord Salisbury for the prompt and courteous response of Her Majesty's Government; and, in March, a copy of the Parliamentary Blue Books, published in that month, was sent to the United States for the use of the Commission at Washington.

#### 8. *Conclusion.*

The conclusions at which I have arrived on this complicated dispute, and which, I submit, are fairly deducible from the foregoing facts and documents are:

1. That the Spaniards were the original European discoverers of South America.
2. That they never actually occupied the whole of it, and in particular, never occupied the whole of the territory between the Orinoco and the Essequibo, or even the Pomeroon.

3. That they recognized the Dutch Colonies of Demerara, Essequibo and Berbice as independent of their authority.

4. That the British succeeded to the whole rights of the Dutch in the said three Colonies, but never had effective possession of the whole of the disputed territory.

5. That the Venezuelans succeeded to the whole rights of Spain in Guiana.

6. That the decision of the Commission of the United States of America can have no binding force on the British Government, but that, under the auspices of the President of the United States, it might be made the basis of negotiations for a conventional agreement of the dispute.

7. That the dispute between the British and Venezuelan Governments is one for amicable negotiation, or international arbitration, and not for war.

8. That, failing a mutual arrangement, three arbitrators, chosen, say, by Britain, Venezuela, and the United States, from the Judges of the Supreme Courts of the three countries specially concerned, could easily and speedily decide this dangerous and long-pending dispute by the principles of International Law.

9. That, inasmuch as the British Government and the Venezuelan Government have some unascertained rights, by cession, and occupation, and they cannot mutually agree to define what those rights are, and that this condition of affairs is injurious to the prosperity of both countries and dangerous to the peace of the world, both Governments, failing a mutual arrangement, should agree to appoint a Commission of Arbitration to decide on the whole of the disputed boundaries, on the principles of International Law, and with full power to the Commission to fix on a natural and permanent boundary, and to give full effect to the principles of effective occupation, under such conditions as to pecuniary or territorial compensation as the Commissioners shall, in their absolute discretion, think fit.



In conclusion, I sincerely hope that this long-pending dispute will be speedily settled in a friendly manner, and on a firm foundation, and to the satisfaction of all the parties concerned, and that whether the disputed territory, in whole, or in part, be ultimately declared to belong to Great Britain or to Venezuela, the people of Great Britain and the United States and Venezuela will show to the world a grand example of justice and moderation. Whatever the virtues of a general International Court of Arbitration, the disputed boundaries of Guiana should be speedily arranged by a special Convention, with or without arbitration, between the Governments of Britain and Venezuela.

ALEXANDER ROBERTSON.

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## II.—AN INTERNATIONAL TREATY FOR THE PRESERVATION OF FLAT FISH.

**I**T were a waste of time to inflict upon the courteous reader (the discourteous reader skips figures) a mass of second-hand statistics to prove the great importance of the Sea Fisheries to Great Britain, and to the whole world.

An abundant supply of cheap, wholesome, and nutritious food, and a School for hardy and daring seamen, are provided by our Fishing Fleet.

Our North Sea fishermen are the best boatmen in the world, and they are as brave as they are skilful; no better men could be found in time of war to man our gun-boats.

The fishing-vessels employ a large number of boys; many of them on "coming out of their time" become seamen in the Merchant Service. If it were not so, the British merchant sailor would become extinct, as ship-owners will not take boys without premium; and boys whose friends can pay a premium and provide a good

outfit, look forward to be officers, and will not go into the fore-castle except by dire necessity.

Clearly then, whatever injures the Fishing Industry is a national loss beyond the mere market value of the fish; and one important branch of that industry, the capture of flat fish (sole, turbot, plaice, skate, &c.), will be impaired, perhaps destroyed, if a close time be not granted to the poor persecuted flat fish from the murderous and wastefully destructive trawl.

I have omitted the halibut purposely; his home is too far North and at too great a depth for the trawl to exterminate him. The trawl is a comparatively new implement of destruction in the North Sea, its use was unknown there at the beginning of the present century; it is a vast pouch drawn along by the fishing-vessel in shallow waters, it sweeps the bottom of the sea, and in capturing those fish fit for the market it destroys myriads of young immature fish.

The evil is universally admitted—it is not denied by any experienced fisherman; and several applications have been made for legislative intervention.

On the 20th February this year, a deputation, representing all the great sea fishing associations of the United Kingdom, was received by Lord Dudley and Sir Courtenay Boyle; the leading speaker was Sir Albert Rollit, he said: "Since 1887 the number of steam trawlers had more than trebled; and one steam trawler was considered equivalent to four sailing-vessels in catching power; and one new form of net had increased the catching power by 20 per cent. A Select Committee, presided over by Lord Tweedmouth, reported, that the cause of the depletion of the fish was the catching of undersized and immature fish."

"It was shewn that of these improperly caught fish, 14 soles went to a lb., many would not do more than cover a penny piece, it would take 24 to cover the palm of the

hand, and in one kit or basket there were counted 2,436 of these immature specimens. . . . What they wanted was that soles and plaice of less than eight inches, and turbot and brill of less than ten inches should not be taken, and these sizes seemed agreed upon by all parties as the desired limit."

Mr. Martin, of the Fishmongers' Company, said that the remarks made represented the views held by the whole of the trade.

On the 10th March last another deputation waited upon the Board of Trade—fishermen from Southwold, Lowestoft, and Ramsgate—who were introduced by Mr. H. S. Foster, M.P., and they were accompanied by Lord Willoughby D'Eresby, M.P., Mr. R. J. Price, M.P., and Mr. Buchanan, M.P.

Mr. Foster said: "There is at present a very great destruction of undersized young fish taking place, that destruction is due to the steam trawlers which had always one trawl down and could work in all weathers; the only remedy he could suggest would be International agreement, so that a close time would be established for the protection of the nurseries and spawning grounds, the localities of which were well known." The "round" fish require no protection by Act of Parliament or International Convention.

The fish caught by hook and line will never decrease on that account; the more able-bodied codfish caught, the larger will be the next generation; hook and line fishing spares the young fry, but the mature cod does not. He is a cannibal, and will devour his own offspring as readily as he gobbles up whiting or herring.

The herring has his close time without the interference of protecting edicts. The herring passes a portion of the year in some retreat far from all his enemies; herrings come forth and retire with a regularity truly marvellous.

All the herrings that man can capture do not affect, in the slightest degree, the supply in the following year.

On the 21st June (or within a couple of days of that date) the vanguard of a host of herrings will reach the Shetland Islands, the number of the main body is beyond all calculation. It will give some faint idea to state that if this great migration were marshalled into one shoal, it would equal—probably exceed—England in area.

This multitude will divide at the Orkneys—the starboard squadron will pass by the West of Scotland and so into St. George's Channel and the North Atlantic—the port squadron will fill the North Sea.

The toll—heavy as it is—taken by men will be trivial to the constant havoc above and below. Flocks of ravenous aquatic birds, and greedy rapacious fish, will never forsake their easy and defenceless prey, until the broken and diminished host returns to its mysterious retreat within the Arctic Circle, to emerge next year in myriads—to suffer similar destruction.

The story of the mackerel is much the same. The first week in April they will appear off the Old Head of Kinsale, and from thence spread all round our coast; all that man and the worse enemies of the mackerel can destroy will have not the least effect upon next year's supply.

The fecundity of fish bears no comparison with the most fruitful of terrene creatures (even the rabbit may hide his diminished head); fish may count their young not by tens nor hundreds—but by tens of thousands—every small grain in the hard roe of a fish (the female) is a possible young fish—patient observers have counted from 40,000 to 100,000, in one fish. I fear to give even higher numbers, not having attempted to verify the count.

Flat fish are equally prolific as the round fish; but there is this essential difference, the flat fish are stay-at-homes, literally and metaphorically stick-in-the-muds, quiet

citizens of their marine corporation; for although they begin life as "round" fish they soon settle down on their sides, the eye on the under side shifts round to the upper side where it can be useful; and there they remain on the same sea-bank until dragged up by the trawl.

Flat fish do not lie on the belly but on the side.

The banks in the North Sea are far more valuable than the most fertile piece of land of the same size; the Dogger needs neither to be ploughed nor sown, and the crop is inexhaustible *if only the ripe product were taken*.

The trawl, even when attached to a sailing-smack, was cruel and destructive; but there was this disability, viz., the trawler was powerless in a calm and ineffective with a gentle breeze, often for a week at a time there was not sufficient wind to drag the trawl along the bottom of the sea.

This brief and blessed period of immunity occurs no more; steam trawlers have displaced sailing trawlers; the wretched soles (and their congeners) have no time to attend to their domestic affairs—the young are destroyed in thousands, and soon the North Sea sole (the most delicious of all fish) will be exterminated.

The remedy is simple to prescribe, but very difficult to administer.

There should be a close time of three months in each year. Let experts decide the period; and, during these months, trawling should be prohibited under heavy penalties.

This is a matter far beyond the power of our own Legislature, and I feel surprised that people should clamour to the Board of Trade for an Act of Parliament, when it is clearly beyond the power of the Houses of Parliament to make laws for the whole of the high seas. All the great fishing banks are beyond the three miles' limit.

"The French, Dutch, and Danes, would heartily thank us, no doubt, for our pains," as Cowper said of any attempt to prevent the slave trade being carried on under the British flag.

The North Sea is surrounded by several independent nations—Norway, Denmark, Germany, Holland, Belgium, and France. An Act of Parliament would only bind our fishermen for the benefit of foreign fishermen, who would supply our markets; and even if prohibition went to the extreme, and all trawl-caught fish were not allowed to be exhibited for sale during the three months close time, still the fish would be caught for the benefit of foreign countries.

No Act of Parliament unsupported by a Treaty could do any good whatever; if only one nation refused to join in the prohibition all would be frustrated.

I cannot believe that any Power would be so shortsighted and obstinate as to refuse to join in an International agreement to preserve the flat fish, especially the sole, from extermination, and the attempt should be made at once.

Clearly then, this is not a question of law but of International agreement—at least the first step must be taken by diplomacy; and after the countries interested are in accord, then, and not till then, can Astræa come to the rescue of humbler scale-bearers.

SYLVAN.

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### III.—CONSTITUTIONAL LAW IN THE TRANSVAAL.

SOME three years after the resuscitation of the Transvaal, since called the South African Republic, a curious case, involving some most important points of Constitutional Law, came for decision before the newly constructed courts of that country. As is usual in Dutch or semi-Dutch provinces, the Court consisted of three judges—a Chief Justice and two puisne judges, to the industry of the former of whom is due the fact of our being able to-day to discuss and consider the doctrines involved in the decision of the case referred to.\* Mr. J. G. Kotzé, the Chief Justice, an English barrister of some standing and considerable experience in practice, had among other things, published two volumes of Law Reports of cases decided during the British occupation in the Transvaal. The two puisne judges were Mr. P. Burgers, a relation of the erewhile progressive Hollander President of the Republic, and Mr. C. J. Brand, a son of the late wise and far-seeing President of the Orange Free State; both these young Dutchmen had been recently called to the English Bar. It was hardly to be expected that two young men, of so small an experience and standing as Burgers and Brand, would be in a position to take a bold stand in favour of the rights of the people, collectively or individually, if they came into conflict with the authority of the House of Assembly or “Volksraad,” as it is more commonly called, and certainly their disinclination so to do was very soon clamoured against from their action in the case of *Nabal v. Bok*, when it was held by the two puisne judges, sitting without the Chief Justice, that the Court was not competent to judge of the validity of the laws of the Transvaal.

Transvaal Law Reports, 1881-4. 1894. Juta (Capetown).

the legality of a Volksraad resolution. The result of the decision was to work an apparent injustice to the plaintiff in the case, who had been summarily dismissed from his appointment under the Government without cause shewn. He had been continued in office by the Republican Government after the retrocession, thus forfeiting his right to compensation from the British Government, which might have amounted to over £200. The only reason alleged for his dismissal was the purport of a Volksraad resolution. This case was heard in the year 1883, and in the next year was the *cause célèbre*, commonly known as the McCorkindale case, in which this holding was approved if not followed by the Chief Justice.\*

The Executive Council of the Volksraad then appointed a Commission, who met with the representatives of the Estate, and came to the conclusion that Londina con-

\* *Executors of McCorkindale v. Bok*, N.O. In this case there was a dispute about land between the Government of the South African Republic and the executors of one McCorkindale. The dispute arose originally with reference to a proposed company which was never formed, and the Government claimed re-transfer to them of 45 farms, which formed part of an estate called Londina, in New Scotland.

On 4th November, 1881, the Volksraad passed a resolution, Art. 343: "The Volksraad, regard being had to the Report of the Commission appointed by Volksraad resolution, Art. 134, of 19th October last, in the matter of McCorkindale, and also to the two courses that might be followed, as recommended by the Commission to the Volksraad, in order to terminate the matter, after due consideration and bearing in mind that three successive State Attorneys have advised that the question should be settled amicably and not by way of legal proceedings, resolves to approve of the arrangement or agreement come to on the 17th January, 1877, by the Government, with the executors of the estate, provided, however, that all rights and claims which the Government may by virtue of the said agreement have against the estate, shall be maintained without delay; that the payment of all sums still due by the executors shall be forthwith demanded, and that in no event shall it be permitted that more ground shall be allowed than that which may be claimed in conformity with existing contracts, that is to say, 200 farms of 6,000 acres each, as mentioned in the original contract."



tained 45 farms too much. The State Secretary then demanded re-transfer of these 45 farms. This demand the executors refused to comply with. The Executive Council then passed a Resolution directing the Registrar of Deeds not to pass transfer of, or register, a mortgage on any of the farms; also directing the Surveyor-General not to pass or approve any diagrams of any of the farms until the executors had complied with the request, or the Volksraad had given further instructions on the subject. This Resolution was published in the *Gazette* on 13th March, 1884. The executors thereupon applied for a Rule calling on the State Secretary, N.O., to shew cause why the Government should not withdraw a notice containing the Resolution of the Executive Council. On the return day, the Court ~~intimated~~ disapproval of the proceedings of the Executive Council. The Registrar of Deeds and Surveyor-General were bound to discharge the duties of their office according to Law, and the Government should have applied for an interdict in the proper way, but in order to afford the Government an opportunity of withdrawing the published notice containing the Executive Council's resolution, applying for an interdict, the Court postponed further hearing till the Tuesday. On the 10th of June, the State Attorney informed the Court that Government declined to withdraw the notice. After hearing Counsel for the executors, the Court, after expressing regret that the Government had not followed their suggestion, said a written judgment would be given.

Before judgment was given, the Volksraad met and appointed a Committee of three members to consider the matter, and, acting on their report (given on the 2nd September), resolved to confirm the resolution of the Executive Council, on the ground that the earlier resolution (No. 343) prohibited Government from taking legal proceedings. On this the acting State Attorney brought the

resolution to the notice of the Court, and submitted that the case was practically at an end.

From this it would almost seem that the Government deliberately interfered to override the High Court in a matter *sub judice*. The Court consisted of the Chief Justice and Mr. Justice Burgers.

The case was argued with great ability by Mr. Advocate Klein, and Dr. Samuel Jorissen, a young Dutch lawyer, lately arrived from Holland.

They quoted the *Grondwet*\* to prove that, according to their Constitution Ordinance, no draft laws or bills could be considered by the Legislature without being published three months previously for general information, and that it naturally followed if the provisions of the *Grondwet* should not be complied with, the mere expression of the will of the legislature would not be Law.

Dr. Jorissen argued that the *Grondwet* was the Constitution of the State and thus occupied a position quite distinct from an ordinary law. The people, and not the Volksraad, were the Sovereign Power of the State, who by means of the *Grondwet* had given a mandate to the Volksraad to be observed in the making and passing of laws. If this authority was exceeded the Court must step in and see that the Constitution was not violated, as was the case in the United States. Finally, the *Grondwet* could not be repealed by implication, as it would be here, nor the Constitution tacitly tampered with in this way. The Volksraad also had, by their action, threatened the independence of the Court by interfering with a matter

\* Article 12 of the *Grondwet* reads as follows:—"The people entrust the legislative power to a Volksraad, the highest authority in the land, consisting of representatives or delegates of the people, chosen by the burghers entitled to vote, provided only that the people shall have three months' notice to send into the Volksraad its opinion, if it so wishes, with respect to any proposed Law, except such Laws as admit of no delay."

*sub judice*, and if the Court were not independent, the people would not be free.

Judgment was given by Kotzé, C.J., on the 15th November, 1894. After briefly stating the argument of Counsel, he goes on to say :—

“ It cannot be denied that a resolution of the Volksraad of a  
 “ general nature, and not founded on pressing necessity, or (as  
 “ sect. 12 of the *Grondwet* puts it) not admitting of any delay,  
 “ would be contrary to the spirit of the *Grondwet* and the  
 “ *Reglement van Orde*. If a resolution of the Volksraad is to  
 “ be regarded as law, it is evident that the people will have to  
 “ conform to it without having had an opportunity of expressing  
 “ their views or objections, by means of petitions, to the  
 “ Volksraad against such resolution. It is, however, in the  
 “ nature of things that a resolution of the Volksraad cannot be  
 “ published three months beforehand, and it by no means  
 “ follows that a resolution of the Volksraad, simply because it  
 “ is a resolution of the Legislature, has not the force of Law.  
 “ It will be sufficient at once to refer to our Statute book, which  
 “ appears to me to shew that a *Volksraad* resolution has indeed  
 “ the force of Law. I do not appeal to the Bylage, or Supple-  
 “ ment, No. 2 to the *Grondwet*, to prove this, for I will readily  
 “ admit that this Supplement merely refers to legal disputes,  
 “ which were either pending, or had been decided in the year  
 “ 1859, when the Supplement was approved by the Volksraad.  
 “ In sect. 220 of the *Grondwet* however, I find the following  
 “ provision :—‘ All prior laws and *resolutions* contrary to the  
 “ ‘ tenor of these laws are hereby repealed.’ Here, then, we  
 “ have *resolutions*, i.e., Volksraad resolutions, placed by the  
 “ *Grondwet* on the same footing as *laws*. This appears still more  
 “ clearly from the Bylage, or Supplement, No. 1 to the *Grondwet*,  
 “ where, in the preamble, and in sect. 1, we read :— ‘ The text-  
 “ ‘ book of Van der Linden, in so far as it is not in conflict  
 “ ‘ with the *Grondwet*, other laws, or Volksraad resolu-  
 “ ‘ tions, remains law in this State.’ The *Reglement van*  
 “ *Orde*, sect. 78, although not stating in so many words that

“ resolutions of the Volksraad are Law, requires that, even as  
 “ in the case of Acts or approved Laws, publication of such  
 “ resolutions shall take place for general information and  
 “ guidance. It is noteworthy that this section of the *Reglement*  
 “ or Rule does not say that the *discussions* or *deliberations* of the  
 “ legislature must be published, but only the *Laws* and *Volksraad*  
 “ *resolutions*. I can therefore come to no other conclusion than  
 “ that by our local Law resolutions of the Volksraad, *properly*  
 “ *taken and published*, have the force of Law, and it is now for  
 “ the first time since 1858 that this position has been  
 “ questioned.”

Passing to the second point, that the *Grondwet* being  
 the Constitution of the State stands on a different footing,  
 that a Law passed not exactly in accordance therewith  
 is *not* a Law, and that it is the province of the Court  
 so to decide. So is it in the United States of America and  
 so is it in the South African Republic. After holding  
 that the case of the United States was not parallel, he  
 continues :—

“ If it once be established that a Volksraad resolution properly  
 “ passed has the force of Law, the Court is bound to respect  
 “ and enforce it. The *Grondwet* of this State cannot be said to  
 “ occupy a different or higher position than any ordinary Law  
 “ passed by the Volksraad. It ought not to be so, but such is  
 “ unfortunately the case. The *Grondwet* did not create the  
 “ Volksraad, on the contrary, the Volksraad created the  
 “ *Grondwet*.”

“ In the same way the provision in our *Grondwet*, sect. 12, that  
 “ all proposed Laws must be published three months before they  
 “ are to be considered, is subject to the same reasoning. This  
 “ provision prescribed by the Volksraad in 1858 is *purely*  
 “ *directory*, and in the nature of counsel and advice given by the  
 “ legislature to its successors. A subsequent Volksraad is not  
 “ thereby prevented from altering or repeating this provision,  
 “ or passing a law which has not been published three months

" beforehand. As legislator the Volksraad cannot bind its successors by any *legal* provision.

" No mandate or commission has been given by the *Grondwet* to the Volksraad, the terms of which it is *legally* obliged to observe.

" A resolution of the Volksraad, therefore, although not proposed in the ordinary form of a Law, is *Law (sic)*, if it clearly appear that the legislature has intended it to be observed as Law, for the will of the legislator is Law."

After holding that the *Grondwet* was not different to other laws, could be repealed by inference by a resolution, and that it was not illegal to interfere with a matter *sub judice*, and referring to a reported case, *Deane and Another v. Field\**, he concludes :—

" In this most important constitutional question I have arrived at the conclusion that a Volksraad resolution has the

\* *Deane and Another v. Field* (1 Ros. 165). Of this case the head-note is as follows :—

A Collector of Customs refused to deliver up goods to the owners on payment of the amount of duty then payable unless they entered into a bond to pay such increased duties as might be enacted by Parliament. This was done in accordance with a Resolution of the House of Assembly. *Held*, that the Collector had acted illegally. The case was adjourned, and subsequent to such adjournment and before the case was again heard, an Act of Indemnity (Act No. 1, 1864) was passed by the Legislature in respect of this case. *Held*, that the Court could not order the goods to be delivered to the applicants, and that the motion must be dismissed."

(Here the Collector was clearly acting illegally, just as the Registrar of Deeds would have done in obeying an order of Executive Council, but it must be noticed and remembered that the omission was remedied in the proper manner by an Act, properly passed under the Constitution Ordinance, and the fact was enforced by the judgments of Bell, C.J., and Cloete, J.)

Bell, C.J., said :—

" It has been argued that it is the duty of the Court to see that the written Constitution of the Colony is not violated. It has not, however, been shewn that any article of the Constitution has been violated : when such occurs we will deal with it ; but at present it is not necessary for us to consider what would be the power of the Court if the Constitution Ordinance were to be

“force of Law; that the *Grondwet* holds no different position  
 “*quoad* the Volksraad than any other local Law; that the  
 “Supreme Court, although free and independent in the exercise  
 “of its functions, possesses no authority to reject a resolution  
 “of the Volksraad. As a constitutional Judge bound to act  
 “in conformity with the existing Law of the State, I can come  
 “to no other result. I have now considered all the points  
 “advanced in the case, and I think it is beyond question that

violated. There has not been any breach of the Constitution by this Act of Parliament.

“This Act . . . having all the requisites prescribed, is one which the Court is bound to carry out.”

Cloete, J., says:—

“The only question I had to consider in this case is, whether this *Gazette Extraordinary*, bearing date the 4th of May, and which has been submitted to us this morning, has the force of Law, and has gone through the ordeal necessary to form it a portion of the Law of the Colony.

“The Constitution Ordinance provides that when an Act has received the assent of the Governor, and has been published in the *Gazette*, it becomes Law, and we are all aware that there is good ground for believing that the Governor has assented to the Act.

(The facts here were simple:—The plaintiffs applied, on April 4th, to the Collector of Customs to deliver to them certain goods, tobacco and coffee, to wit. The goods were stored in bond; the Collector refused to deliver unless they entered into a certain bond to pay, in addition to ordinary duty, such other duties as should be imposed by Parliament during present Session. This they refused. It seems the Collector acted under certain instructions from the Governor in consequence of a Resolution (April 29th, 1864) of the House of Assembly, to the effect that such bond should be entered into by persons paying duties after April 29th. The appellants applied for Rule calling on Collector to shew cause why their goods should not be delivered up to them. *Held*, Collector had acted illegally and was liable in damages.

The point of distinction between these two cases lies, of course, in the fact\* that in the Cape case the Court clearly held that there had been no violation of the Constitution; that the Act had all the requisites prescribed, and had “gone through the ordeal necessary to form it a portion of the Law of the Colony,” whereas the Chief Justice Kotzé has distinctly held that the Volksraad resolution was wanting in these respects, and nevertheless had the force of Law irrespective of its constitutional defects.)

“ as the supreme power in the State, the Volksraad is not under  
 “ any *legal* obligation.”

Ending up somewhat pathetically :

“ Until the Court had given a written judgment in this  
 “ application, the matter continued pending—it was still *sub*  
 “ *judice*, and it would have been better, under the circumstances,  
 “ if the Volksraad had not proceeded to confirm the resolution  
 “ of the Executive Council. Such a proceeding has the  
 “ appearance of an interference by the Volksraad with a case  
 “ *sub judice*. I am satisfied that such was not the intention, and  
 “ we should not presume that the legislature so intended. The  
 “ object of the Volksraad was to regulate once for all the  
 “ McCorkindale case, which had so often been before it. At  
 “ the same time, even the semblance of interference with the  
 “ Court should be studiously avoided. The independence of  
 “ this Court is not only guaranteed by the *Grondwet*, it is one of  
 “ the pillars of the State and a source of safety to the citizens.  
 “ The inviolability of the Court is inseparably connected  
 “ with the welfare and the independence of the Republic.  
 “ Regard being had to the Volksraad resolution of September,  
 “ it is unnecessary now to make any other order than  
 “ to condemn the respondent, N.O., in the taxed costs of this  
 “ application.”

Burgers, J., concurred.

In considering the judgment it is to be observed that the case was heard on the 17th September, judgment being given on the 15th November, so that we must presume the Chief Justice to have carefully taken all the points advanced by the plaintiff's counsel.

Some of the doctrines propounded are certainly startling at first sight, and even after sight, such as the comparison of the Volksraad of the Transvaal with the Legislature of Great Britain, consisting of the Sovereign and two Houses of Parliament, or of Holland, consisting of the Sovereign and the States General. Kotzé quite omits to mention

what he cannot fail to perceive, that in England and Holland the very fact of the Legislature being split up into bodies or elements, as it were, is a protection against hasty and inconsiderate legislation. Again when he argues that resolutions are noticed in the *Grondwet* as having the force of Law, it is inconceivable that so astute a lawyer and intelligent a man as Chief Justice Kotzé can have failed to see the fallacy of his own argument. The Volksraad before the *Grondwet*, and the Volksraad elected under and in accordance with that *Grondwet*, are surely on a different footing; the proposition seems altogether to be too obvious. The effect of the judgment on the whole was to constitute the Volksraad an assembly of tyrants who were above the Law, and not bound by the Constitution Ordinance, who were free to legislate as they wished, and whose Laws, however unjust and unconstitutional, a Supreme Court was bound to administer and cause to be carried out. Such appears to be Chief Justice Kotzé's understanding of the duties of a "Constitutional Judge."

In January, 1884, another case of a similar nature came before the Court. This case has not been reported so far as we are aware, and the only available document in connection therewith is the dissentient judgment of Mr. Justice S. Jorissen, the same Dr. Samuel Jorissen who argued the case of McCorkindale. The plaintiff in the case, a Mr. Theodore Doms, had a dispute with the Government concerning certain farms, twenty-five in number, which he claimed as his property, and sent a request to the State Secretary that they should be transferred to him immediately. Thereupon the matter came up in the Volksraad, and a resolution, proposed by Mr. Taljaard and seconded by Mr. Neethling, was unanimously passed to the effect that Mr. Doms had no right to the farms, that he should receive neither farms, nor compen-



sation, and that the resolution was to serve as a final settlement of the case.\*

Anything more unconstitutional, more tyrannical, more illegal and inequitable it is impossible to conceive. Subsequently, Mr. Doms brought an action against the Government through Mr. Bok, the State Secretary. Needless to state, that the merits of Mr. Doms' claim, whatever they may have been, were barred by the precedent established by the Chief Justice in McCorkindale's case.† Dr. Jorrissen's judgment, however, is indisputable. His arguments in the previous case are reiterated and amplified, and the reasoning of Mr. Kotzé absolutely negated by the clear and lucid exposition of facts, and obvious inference. He based his judgment entirely upon the *Grondwet*, easily destroying the erroneous opinion of the Chief Justice that the Volksraad created the *Grondwet* and not the *Grondwet* the Volksraad, and noting that a judge has the right to enquire whether the conditions of the *Grondwet* are satisfied and whether a Volksraad that has come into being is according to the prescribed forms of Law. He then held that the resolution in issue had come into being, not in the form prescribed by Law and was consequently not Law nor had the force of Law.

Further, with reference to the exception that the cause was a *res judicata*, he held that the Volksraad had no judicial power so as to make the cause a *res judicata*, and consequently that the exception should be dismissed.

\* \* Holding a semi-official position myself as Private Secretary to Mr. R. C. Williams, H.M. Agent in Pretoria, a year later, I distinctly remember the unfortunate plaintiff in this case applying for relief as a British subject

† The judgments of the Chief Justice in the McCorkindale case and of Dr. S. Jorrissen in Doms' case, in Dutch, are published by Dr. E. J. P. Jorrissen's collection of *Wetten der Zuid-Afrikaansche Republiek*, Groningen, 1894.

It is worthy of notice that in both these cases the plaintiffs deprived of their property were British subjects.\*

Seven years later the same point came up for decision in rather a different form. Mr. Henry Hess, the brave Johannesburg journalist, was convicted of criminally libelling one of the High Court Judges and sentenced to two months' imprisonment. The libel consisted of certain allegations in connection with the Judge's dealings in money matters, more especially with suitors who came before him. Mr. Hess took certain legal exceptions to the indictment, among others that the Law under which he was convicted had not been passed in accordance with the forms prescribed in the *Grondwet*. During the course of his argument the Judges intimated their dissent from the argument of Mr. Leonard, Q.C. (who appeared for the Government), on the subject of the unlimited powers of the Volksraad; the Chief Justice stating that he was glad of an opportunity of modifying certain opinions laid down in McCorkindale's case. In his decision, however, he still declined to settle the point and sustain the exception.

Many changes had taken place in the Transvaal during the seven years that intervened between the cases of Mr. Doms and Mr. Hess, and the Chief Justice having stood as a candidate in the last contest for the Presidency, has perhaps paid closer attention to Constitutional Law in general, and that of the South African Republic in particular. The Uitlander population, meanwhile, are probably trebled in number, and their political importance proportionally increased. But it is noticeable that it was not until the year 1894 that Chief Justice Kotzé published his report of the McCorkindale case in English, which we would naturally suppose he intended to represent as his

\* [If the decisions were considered bad how is it that there were no appeals to the Privy Council?—ED.]

mature opinion on the important subject of which it treats. A perusal of the following judgment in Mr. Hess's case will clearly shew how complete has been the change in his opinion from the year before; for he cannot be supposed to have given to the world as a ruling, opinions which he disavowed entirely a year later. Had the Chief Justice reiterated his former opinions, it is probable that he would have been overruled by his colleagues, Dr. Jorissen and Dr. Ameshoff, who foreshadowed their ideas, in the course of the argument, without formulating them in their judgments.

I append the judgment\* in Mr. Hess's case without further comment.

\* *The State v. Henry Hess*, May 2nd.—*Kotzé, C.J.*: In this appeal from the decision of the Circuit Court of Johannesburg, the appellant complains that he has been wrongly convicted, and chiefly on the three following grounds:—

1. That the Act, No. 11, 1893, under which he was tried, is in reality no Law, inasmuch as:

(a) It was not passed by the Volksraad with the due observance of the required formalities;

(β) Because there existed no pressing necessity for the passing of the Law, as required by Art. 12 of the *Grondwet*.

2. That sect. 3 of Law No. 11, 1893, for the contravention of which the appellant was more particularly indicted, creates no offence.

3. That after the plea of justification the indictment was improperly amended.

Article 12 of the *Grondwet* reads as follows:—

"The people entrust the legislative power to a Volksraad, the highest authority in the land; consisting of representatives or delegates of the people, chosen by the burghers entitled to vote, provided only that the people shall have three months' notice to send into the Volksraad its opinion, if it so wishes, with respect to any proposed Law; except such Laws as admit of no delay."

The *tripartite* division (*trias politica*) of Governmental function known to Aristotle, and, at a later period, so warmly eulogised by *Montesquieu*, as necessary for the good government of the State is even, as with other civilised countries, also adopted by our Constitution (*Grondwet*), and it is my duty as Judge, above all, to respect and maintain the Constitution. The sovereign

power vested in the people has, through the medium of the *Grondwet*, been entrusted by it, in various ways, to the Volksraad, executive and judiciary.

The *Grondwet* ordains that from the proper action of these three institutions, each within its own peculiar scope and sphere, the State shall be governed. It entrusts to the Volksraad, consisting of representatives or delegates of the people, the task of making the Laws, subject to certain limitations. Such a provision is not contrary to the notion of sovereignty—sovereign power, or as *Grotius* calls it, supreme power (*summa potestas*). *Huber*, who was acquainted with the writings of *Hobbs*, has in his *Jus hodiernum* (Bk. 4, Chap. 7), rightly observed that the sovereign power of the State may be limited by fundamental Laws; and even *Austin*, the great advocate of the position that sovereign power or sovereign legislature (which he considered as synonymous) is not subject to any legal limitation, does not deny that the exercise of this power may in a way be regulated by a Constitution (Sect. 6, p. 251-2, II.), which seems to follow from the very nature of the case. It is not necessary to have recourse to the supposition that the *Grondwet* or Constitution is to be regarded as if it were a covenant or pact between the governors and governed, for such indeed it is not, it is simply a declaration by the people serving as the basis of the government of the State, and pointing out how different the powers of the State are. To exercise the several portions of the sovereign power entrusted to them, each of the three powers named, must consequently exercise its functions in accordance with the *Grondwet*. It is likewise a mistaken notion, as some still seem to think, that the power of testing the validity of the acts of the legislature by reference to the Constitution, which is accepted as an axiom in the great Republic of North America, owes its existence to any direct provision in the Constitution of the United States.

The Constitution nowhere lays it down. It flows tacitly and necessarily from the very nature of a popular government, under a Constitution. It is surely open to the people to protect itself against certain innovations and alterations of the Laws, more especially of the Constitution, a precaution which Art. 12 of our *Grondwet* has also taken.

The appellant has traced the history of Law No. 11, 1893, through the First Volksraad, and has endeavoured to shew that no necessity ever existed for the passing of such a penal statute against the press, according to the letter and spirit of Art. 12 of the *Grondwet*. He has also argued that no proper Resolution was taken by the Volksraad, nor published, setting forth the pressing necessity, nor is there any clause or section in the Law itself stating that it has been passed in accordance with Art. 12 of the *Grondwet*. This embraces a very important constitutional question. The properly expressed will of the Volksraad is Law. This will must be declared in proper form and the Law duly promulgated. Of this matter and of the question whether a Law is in conformity with the *Grondwet*, the Court must judge; but it is not at liberty to decide upon the internal value and policy of the Law, whether the Law be in the interest of

Society, or whether it be necessary, or cannot brook delay, is not for the Court to determine. This last falls within the province of the Legislature. An enactment, says Opzoomer, is no Law as long as it does not conform to all the requisites prescribed by the Constitution for the existence of a Law. These requisites are twofold.

1. The Law must proceed from the competent authority.

2. It must proceed from that authority in the prescribed form. But if the Legislative power exceed the limits set by the Constitution, it ceases to be the competent authority, for its competency only extends up to those limits.

The Judge therefore, who tests any enactment by reference to the Constitution, merely enquires if it be in reality a Law, and acts in accordance with his right and duty. If his inquiry has satisfied him that the enactment submitted to him is indeed the Law, he cannot go further and decide upon its merits, nor is it competent for him to inquire whether the Law is not contrary to the public interests or his notions of equity. ("Aant op de Wet H. Algemeen Bepalingen Editie, 1884," pp. 193-4. See also "Winschied," p. 14; "Huber," Chapter 7; "Blockmen de Omschenbaardheit der Wet," pp. 52, 53, and 215; "De Kusne de Beveegsheid der Rechterlyke Magt.") I think this view of our Constitution, although in conflict with some of the *dicta*, in the case of McCorkindale decided in 1884, is correct. Further consideration and study have induced me to alter some of my previously expressed views and to adopt that of Professor Opzoomer.

The *ratio decidendi*, however, of my judgment in the present case will rest on the second objection raised.

FRANCIS J. COLLINSON.

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#### IV.—THE GRIEVANCES OF JURYMEN.

THE Bitter Cry of the Jurymen, recently voiced in many quarters and exemplified in the inevitably prolonged trial, *Regina v. Balfour and Others*, has served once more to bring before the public the strangely-neglected grievance of a very large class of citizens throughout the country. A draft bill or two for the "Amendment of the Jury Laws" may be the annual product of a lay Member of Parliament; a resolution for their "Reform" is in the string of hardy-annual pious opinions expressed at the Trades Union Congress. Some exceptional wail of a stray member of the public, dragged from his office or his business and tied to the car of Justice for a week, may excite momentary sympathy. But, that is all; and official Justice goes remorselessly on bidding its victims to be in attendance on its summons, from which there is no appeal. Let us summarise the nature of the grievance, and perhaps from that the form of remedy may be deduced. In the first place, official Justice has not to bear the sole responsibility. The Law, the Litigant, and, finally, the *Salus Reipublicæ*, are severally responsible. For the administration of the Criminal Law (including, under that head, Coroners' Inquests) the State itself requires a jury. In civil suits the litigant alone, subject to legal assumptions and regulations, is responsible for a jury being empanelled. For the legal assumption that a civil litigant will require a jury unless he signifies his wish to the contrary, and for the requisition of a jury in criminal cases, public opinion as to the welfare of the State in relation to Justice is finally responsible.

Now the meaning of Trial by Jury in modern times can best be summarised by a quotation from Sir Henry Maine. It is "a relic of ancient Popular Justice. The Jury,

technically known as 'the country,' is the old adjudicating Democracy, limited, modified, and improved in accordance with the principles suggested by the experience of centuries so as to bring it into harmony with modern ideas of judicial efficiency. The change which has been made in it is in the highest degree instructive. The jurors are twelve instead of a multitude. Their main business is to say 'Aye' or 'No' on questions which are, doubtless, important, but which turn on facts arising in the transactions of every-day life. In order that they may reach a conclusion, they are assisted by a system of contrivances and rules of the highest artificiality and elaboration. An expert presides over their deliberations. There is a rigid exclusion of all testimony which has a tendency to bias them unfairly. They are addressed, as of old, by the litigants or their advocates, but their inquiry concludes with a security unknown to antiquity, the summing-up of the expert President, who is bound by all the rules of his profession to the sternest impartiality. If he errs, or if they flagrantly err, the proceedings may be quashed by a Superior Court of Experts. Such is Popular Justice after ages of cultivation." With this scientific photograph, so to speak, as illustrative of the subject-matter of this article, no further description of the jury-system is necessary. But one more quotation from another source (*Reg. v. Edmonds and others. State Trials, Macdonell*, Vol. I., p. 907) will equally clearly illustrate the type of jurymen accepted for the administration of this Popular Justice. "The policy of the Law of England says that we are rather to reject professional men from juries, and we are rather to go to men of plain minds, whose attention has not been particularly directed to legal studies, or to any of those refinements which, I only speak the language of our Constitution when I say, prevent them from a clear and fair judgment." The main requirements then of

the ideal jurymen deducible from the above quotations are that he should be a man of "a plain mind," generally cognizant of "facts arising in the transactions of every-day life," and capable of weighing evidence and expert criticism *before* coming to a fair conclusion on the issue as placed before him. The artful contrivances of the law of evidence, of professional advocacy, and of expert review and regulation of the conduct of the case are all only intended as means and aids towards the proper exercise by a jurymen of his express functions.

What ails the machine, then, that it will not work well in spite of such an interesting evolution and such admirable tendencies derivative from its institution? There are two main classes of complaints. One from the class of existing jurymen that the burden of the discharge of the duties demanded from them is, in these days of pressure of business, too heavy to be borne. The other from the class represented by Trades Unions, that the "privilege" of serving on juries is too exclusive, and that the working classes require a share in the extensions of these privileges to themselves.

To deal with the latter "grievance" first, since it is capable of being disposed of more shortly, the demand for an extension of jury qualifications so as to embrace the artisan and labouring classes generally is based upon the assumption that to act as a jurymen is a "privilege" from which those classes have hitherto been ruthlessly excluded. But consider for a moment the practical effects of the exercise of such a privilege as regards the individual jurymen. A qualified jurymen once upon the Overseers' Jury List may be called upon to serve once a year at each particular class of Court for which he may receive a summons. In the Metropolis those Courts may be the High Court, the London monthly Sessions, the Central Criminal Court, the district County Court, or a



Coroner's Court, and possibly a Sheriff's Assessment Court. In the country his attendance may be required at the Assizes, the Quarter Sessions, the County, or the Coroner's Court. Each of those Courts (except possibly the Coroner's Court) work upon the same Jury List so far as it applies to the several districts over which they have jurisdiction ; and with good fortune a jurymen may receive a summons from each Court in the same year. At any rate, if he escapes from serving in more than two of these Courts in one year, a stray summons from one of the other minor Courts may serve to keep his exercise of the privilege from getting rusty. As to the time consumed, in the High Court he may be kept in attendance for a fortnight, at the Assizes or Sessions for the best part of a week, at the County Court perhaps for a couple of days, while an Inquest or Assessment may take up a full day. How is a labouring man working for a daily wage to spare the time for any of those privileges ? How, again, is such a one to be always at hand in one locality when jobs may take him all over the country ? What will an employer say to a skilled or unskilled artisan at work at a busy time in a factory, or on a contract job, if such a one be summoned away to dance attendance on a Court of Justice ? And how much value will the workman place upon gaining this privilege under such circumstances ? Even assuming that the State were induced to guarantee to him the standard rate of wages for each day of his attendance (a most impracticable assumption), how could his place be possibly kept open for him to return to it at the expiration of an uncertain time ? It would appear, then, even from this short summary of objections, that for the workman employed at a daily wage or by piece-work the privilege of acting as a jurymen from his individual point of view is valueless and impracticable. Would it from a public point of view be advantageous or desirable ? Recall for a moment the three main require-

ments of the ideal jurymen cited above. He was to be a man "of a plain mind," "generally cognizant of facts arising in the transactions of every-day life," and "capable of weighing evidence before coming to an impartial conclusion on the particular issue as placed before him." Without casting any aspersion on the working-classes of this country, and without attempting the impossible task of drawing up an indictment wide enough to embrace every member of a class, it may be asserted that from the circumstances of their lives it is exactly these three qualifications in which they are, as a class, deficient. They have not "plain" minds. The clever artisans are opinionative and imaginative, the dull working-men are narrow-minded, confining their attention to details. All working-men are as a rule "specialists." Secondly, they have not that business knowledge, that knowledge of affairs, as Frenchmen suggestively put it, so indispensable for passing general verdicts on men's conduct and character. Lastly, impartiality, the faculty of weighing evidence and reserving judgment till all is said that can be said, is not a characteristic easy of attainment for the working-man. He makes up his mind quickly. He is over suspicious of argument. He waxes over-righteous over the faults and sins of classes outside his own. He is inclined to be over-emotional and forgiving to the failings of his own class. It may be said that such charges apply to all classes. But the fact is that the other classes out of which juries are formed, and more especially what are broadly called the middle-classes, are so much more varied, cover such an infinite variety of employments, and include so many gradations of life, that juries formed of such material are far more multifarious than any working-class jury could be. Nor would juries necessarily remain mixed were the working-classes added to their ranks, because the preponderance of the latter in so many

districts would over-weigh or altogether eclipse the variety of other classes obtainable, just as now in strictly agricultural districts it is difficult to get a jury other than of farmers, so that a dispute between a landowner and a farmer can scarcely be adequately adjudicated upon at a country assize town.

Now the middle-classes, with all their limitations, have that "shop-keeping" capacity, that business qualification, which can recognise the "give and take" so necessary for civic life, and which forms the main subject for adjudication in the large majority of disputes. Both as to what constitutes "fraud" and what "libel," and at what point either becomes criminal, a middle-class jury are better judges of what will satisfy public opinion and the average sense of justice than a high-class or a working-class jury. Probably "fraud" would have an unnecessarily wide definition, and libel an unnecessarily narrow one from a jury of either of these last-mentioned classes. On the other hand, no doubt, questions of art and literature receive too summary a consideration from strictly middle-class jurymen, but this could be remedied by insisting on the upper classes taking their share of jury-service, which by some means or other, they so largely evade by legal exemption or otherwise.

The qualifications of jurymen need levelling up rather than widening downwards. Leaving that point, however, for elucidation by legislators, let us see whether the existing grievances of jurymen cannot be appreciably lightened. These grievances are mainly two: one, that of too frequent service; secondly, the burden of wearisome attendance pending service. The first could be remedied in two respects: First, by improving the method of drawing up the Jury Lists, so that these lists should really consist of existing qualified jurymen. At present the overseers simply re-copy old lists without verification, and add thereto any

freshly qualified residents whom they may happen to light upon. The result is frequently that the panel returned to the Officer of the Court, through the Sheriff, is utterly unreliable, and out of 72 names he may find it difficult to secure two full juries with which to keep going a couple of criminal and civil Assize Courts, the remaining names being only applicable to persons "dead," "gone away," or "not found." Were 72 really available, arrangements for releasing so many on one day, and securing their attendance on another, could be easily carried out, but with unreliable lists the officials cannot venture to exercise any discretion, while for any actual authority to release individual jurymen-in-waiting application must be made to the Judge, a process always alarming and often impracticable. Judges engaged in carrying through an Assize cannot be expected to spend time every morning and afternoon in listening to individual applications for relief. Moreover, one Judge cannot answer for the state of business in another Court where jurymen may be equally wanted. The right to challenge jurymen, moreover, though not of frequent occurrence in England, must always be kept in view, and in civil cases, especially on Assizes where local litigation has often caused local feeling, many names of jurymen will be marked off by either side as undesirable to be called owing to their knowledge of the parties or to their likelihood of being prejudiced on the matter in dispute, though they must necessarily be kept in attendance for a subsequent case. Then there is the great uncertainty of the length of a cause, and also the impossibility of knowing beforehand whether the jury in the box will want to retire to consider their verdict, or will continue to serve for the next case. At Assizes and Sessions the business must be carried through in a limited time, and for a Court to come to a standstill for lack of jurymen is a serious matter. In London permanent sitting arrangements are

more easy, since a Judge will not break his heart even if business does collapse owing to the sudden ending of an apparently long cause, during the hearing of which jurymen-in-waiting have been released from attendance. It is not generally known that the ordinary precept issued to the Sheriff requires him to summon for a petty jury panel not less than 48 or more than 72 in one panel, and for a special jury panel not more than 48, or in London not more than 30. In large towns it is customary to summon petty jurymen in two panels of 72 each for attendance at different times specified on the summons, and special jurymen are similarly summoned in two panels of 48 each; but if, owing to pressure, two Courts try special jury causes, not a man can be excused attendance for a single day, and even then, owing to faulty lists, business may come to a standstill, or parties have to be content with a jury of 9 or 10. This last remark points to another possible remedy. While a jury of 12 may be always retained in criminal cases as a bulwark of the constitution, the same number in civil proceedings has no such strong traditions. Trial by jury in civil causes is only one of many methods of trial. The whole civil procedure moreover is so modern. It has assimilated much of equity; in those Courts no jury exists as a rule. In County Courts, in spite of their greatly enlarged jurisdiction, a jury of 5, if desired at all, is considered amply sufficient. Since the passing of the Rules of the Supreme Court, 1883, the *prima facie* procedure in the majority of causes of action is for trial before a Judge alone. In any case trial by jury is optional. Why should not the number of the jury be optional? Let 5 or 7 be the legalised minimum for the High Court, with the option left to litigants to require a full jury of 12. With a lesser number of jurymen and with more adequate panels the burden of service would be lightened at both ends, as it were, while litigants would have the advantage of

securing a verdict from the smaller number, instead of the extensive and worrying predicament of a disagreement among a jury. In criminal cases no alteration would be advisable, so many different considerations appertain to trial by jury in that respect, and a disagreement is not so frequent, owing to the simpler issue left to a jury, namely, the general verdict of "Guilty" or "Not Guilty," while a disagreement, even if it does occur, is not so material. The accused can always be re-tried, or the very fact of such disagreement may serve as a hint of the advisability of dropping further prosecution. It implies, in fact, that the accused should have had "the benefit of the doubt."

A third remedy, and the one most commonly urged, is that of payment to the jury. There is nothing very revolutionary in such a proposal, since in civil cases, although no statutory fee exists for common juries, as in the case of special jurymen, each county has a customary fee varying from 8d. to 1s. per case, which is frequently not claimed, only because of its absurdly small advantage. This fee is paid by the party claiming to have the cause tried by a jury. In criminal cases, where the service of jurymen is made obligatory by the State, no fee is given. There seems to be no adequate reason why every jurymen, required by law to be in attendance at a Court, whether a Crown or Civil Court, should not be allowed his journey expenses and refreshment allowance upon the same scale as a witness is allowed to claim. A jurymen, whether in the box or in attendance, is a part of the official machinery of Justice, yet the only part whose works are not oiled at the State's expense. The amount allowed would be on a scale regulated by the county treasurer or official taxing-master, and the production of the jury summons would be sufficient proof of attendance. If an attendance fee for expenses were allowed the plea for a

service fee in criminal cases might be fairly avoided. It is the attendance which makes the expense, not the service, which is much preferred to the waiting in Court, and it is the attendance which is the common duty required by the State. In civil cases, while the attendance fee can be fittingly required from public sources, a fee for service should be paid by the parties requiring this service, as is the case now; a 5s. fee would probably be the fair amount. On the other hand, if special jurymen obtained an attendance fee, their service fee might be reduced to 10s. 6d. An adjustment of the entrance and judgment fees might compensate litigants, namely, £1 for entering a cause and £2 for entering up judgment, instead of *vice versa* as is now the case; so many causes being either compromised or withdrawn after entry and without any judgment being necessarily entered up. The costs of litigation should not be unduly sacrificed for the convenience of jurymen discharging a public duty, and one for their own advantage as members of the public.

Lastly, some executive improvements in the calling of juries would procure alleviation. The responsibility of securing a sufficient attendance of jurymen might advantageously be left to the officer of the Court. He is in touch with the jurymen in a way which is not open to a Judge who has more important duties to attend to. Let this official have full discretion in arranging for and in excusing temporarily the jurymen-in-waiting. Were the officer of the Court allowed to call two full juries every morning at the sitting of the Court, one for service and one to be in reserve, and to let all the rest go for a stated time much inconvenience would be saved. For this one requisite is necessary. Notification must be given beforehand of the names of any jurymen objected to for particular cases for trial, either in the whole list or in the day's list. Copies of the panel can always be procured, and

a marked copy could be attached to the pleadings in each cause entered, or to the depositions in criminal cases, or be deposited by the solicitor for the defence of any accused person. This would save the tedious form of oath in felonies, and challenges need only be referred to the Court when not based on grounds sufficient to satisfy the officer of the Court as *bonâ fide*. It would also do away with the invidious distinction, amounting to a public affront, where a jurymen is ordered or requested to leave the box owing to the whispered objection of some party to a cause just before the jury are to be sworn, a course which some Judges refuse to allow, but which in that case leaves the litigant a cause of grievance should the verdict go against him on the ground that he has not had, in his opinion, a fair jury. In the period of peaceful remedial legislation now promised, will not some legal or lay legislator devote himself to remedying the grievances of jurymen by some such reforms as are above suggested and which seem to lie within easily adaptable methods? Perhaps the Solicitor-General, who, by a very short and simple Act, has cured the incubus of Divisional Courts, will, by an equally summary and sensible method, enshrine his name on the roll of fame as the Saviour of the Jurymen?

S. L. HOLLAND.

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## V.—HOMICIDE IN THE ROMAN LAW.

IN comparing the manner in which homicide has been dealt with by the Law of England and the Roman Law respectively, nothing is more striking at first sight than the elaborate analysis and classification of the one system as compared with the absence of coherent method and arrangement in the other. In English Law homicide—defined by Sir James Stephen as “the killing of a human being by a human being”—is divided into felonious and non-felonious: felonious homicide is sub-divided into suicide, murder, and manslaughter, non-felonious into justifiable and excusable homicide, and each of these sub-divisions is defined and elaborated with the utmost nicety of detail. In the *Corpus Juris* the crime of homicide is principally discussed in *Digest* 48. 8, and *Code* 9. 16, dealing with cases—chiefly of homicide—falling under the famous *Lex Cornelia* of Sulla, and in *D.* 48. 9 and *C.* 9. 17, dealing with parricide, which was treated as an offence *sui generis*, and visited with a special and extraordinary punishment. In these Titles we miss the careful definition and scientific analysis familiar to students of English Law, and are left to collect our notions of the crime, and of the principles of legal liability from a number of fragments, arranged without any apparent regard for order or coherency. It is the object of this paper to shew that homicide, as conceived of by the Roman Law, is susceptible to the same process of classification as in the Law of England, to point out some of the main distinctions, and to state the principles of liability, and the grounds of justification and excuse. With this end in view we shall adopt the classification familiar to English lawyers, and treat of the fragments arranged under the aforesaid Titles in the order in which they would group themselves in English Law.

I. FELONIOUS HOMICIDE. (a.) *Suicide*.—The Roman Law does not appear to have regarded suicide as a crime: an oft-quoted passage on the subject seems to refer only to the case of soldiers:—"Qui se vulneravit vel aliam mortem sibi conscivit, imperator Hadrianus rescipit, ut modus ejus rei statutus sit, ut, si impatientia doloris aut tædio vitæ aut morbo aut furore aut pudore mori maluit, non animadvertatur in eum, sed ignominia mittatur, si nihil tale prætendat, capite puniatur." (D. 49. 16. 6. 7.)

(b.) *Murder*.—Here we have nothing corresponding to the elaborate definition of Coke (3 Inst. ch. 7), and in fact the Roman Law did not expressly recognize any formal distinction between murder and manslaughter, although it seems to have recognized as deserving of a less severe punishment certain cases of what would be termed manslaughter in English Law. It must first of all be noted, as most important, that the intention to kill, manifested by some overt act, was placed on the same footing with the consummated crime: "In lege Cornelia dolus pro facto accipitur." (D. 48. 8. 7.) V. D. 48. 8. 1. 3. where it appears that the intention is to be inferred from the nature of the instrument with which death is inflicted, "nam si gladium strinxerit et in eo percusserit, indubitate occidendi animo id eum admisisse: sed si clavi percussit aut cuccuma in rixa, quamvis ferro percusserit, tamen non occidendi animo;" v., too, D. 48. 8. 14., C. 9. 16. 1. 1. A person who went about armed, "hominis necandi causa," was liable under the Cornelian Law. (D. 48. 8. 1., C. 9. 16. 7.) This case seems to fall within the general principle which punished the criminal intention when manifested by some overt act.

Again, a person was liable to the penalties of the Cornelian Law who prepared, sold, or kept poisons or noxious drugs "hominis necandi causa." (D. 48. 8. 3, pr. 1.)

The following offences were also punished by the Lex Cornelia: giving false testimony so that an innocent person

was convicted of a capital offence (*D.* 48. 8. 1. 1), as magistrate or *judex quæstionis* suborning false testimony against the innocent, or receiving money to convict an innocent person (*D.* 48. 8. 1, pr. and 9). Murder by false testimony is only punishable as perjury in English Law, which in this respect certainly seems behind the criminal jurisprudence of Rome. Infanticide does not appear to fall within the provisions of the *Lex Cornelia*, for offering a child in sacrifice was punished capitally by Valentinian, Valens, and Gratian (*C.* 9. 16. 8). Fœticide or abortion is not regarded as homicide by English Law, which requires the killing to be of "a reasonable creature in being" (3 *Inst.* ch. 7). We might infer from the fact that it is mentioned in *D.* 48. 8, which treats of offences under the *Lex Cornelia de Sicariis*, that it was so regarded by the Romans; but the true reason for regarding it as a criminal offence, viz., that it was a fraud upon the husband, appears from *D.* 47. 11. 4. It was punished with temporary punishment.

As to the punishment under the *Lex Cornelia* (*D.* 48. 8. 3. 5), persons of inferior condition were exposed to wild beasts; persons of rank suffered deportation.

(c.) *Manslaughter*.—The formal distinction recognized by English Law between the two different degrees of guilt that may be involved in the killing of a human being has no counterpart in Roman Law. Nevertheless, a practical distinction appears to have been drawn, as will be seen from the following instances:—In *D.* 48. 8. 1. 3. we have a case of homicide committed in a brawl: "*Leniendam pœnam ejus, qui in rixa casu, magis quam voluntate homicidium admisit.*" This is clearly a case of manslaughter. A person who had killed his wife in the act of adultery was not subjected to the full rigour of the law, but was banished, either for life or temporarily, according to his rank. (*D.* 48. 8. 2. 5.) The Roman Law and the Law of England are in agreement upon this point. In *C.* 9. 16. 1 pr.

we have a curious case: the Emperor Antoninus, in a rescript addressed to Aurelius Herculianus and other soldiers, declares a certain soldier to be exempt from the penalties of the Lex Cornelia de Sicariis, because, although he had killed a man, he had not done so of malice prepense (*non occidendi animo Justum a se percussum esse*).

The case is evidently one of manslaughter, for though the delinquent escapes the penalties of wilful homicide, he is nevertheless liable to be punished by a court-martial (*remissa homicidii pœna secundum disciplinam militarem sententiam proferet*). But perhaps the fact that the case was remitted to the military tribunal shews that some breach of discipline, merely, was involved.

It appears from *D. 48. 8. 7.* that *culpa lata* was not regarded as equivalent to *dolus* (*neque in hac lege culpa lata pro dolo accipitur*). Therefore homicide due to criminal negligence was apparently not recognized by the Lex Cornelia. Gothofred, however, seems to have been of the opinion that *culpa lata* was punishable under the Lex Cornelia, but with less severity than *dolus* (*culpa igitur lata in lege Cornelia de sicariis mitius punitur quam dolus*). Professor Hunter is of opinion that homicide by negligence was punished during the Empire *extra ordinem*, by relegation, or sentence to the mines (*Roman Law*, p. 1069). He cites *D. 48. 8. 41.* where we are told that Hadrian approved the sentence of relegation passed upon a man who "*per lasciviam causam mortis præbuisset*;" it may be doubted, however, if this is a case of homicide by negligence (*v. D. 48. 8. 3. 2*), for a case of what might be manslaughter through negligence in English Law.

II. NON-FELONIOUS HOMICIDE. (*a.*) *Justifiable Homicide*.—The killing of deserters (*transfugæ*) was lawful. (*D. 48. 8. 3. 6.*) Compare the rules of English Law as to arrest of felons, and as to killing prisoners who attempt to escape.

Homicide in prevention of certain criminal assaults was justifiable. (*D.* 48. 8. 2. 4.) Certain other cases are mentioned by Professor Hunter. (*R. L.*, p. 1069.) Homicide in defence of life was justifiable (*C.* 9. 16. 2; *v. C.* 9. 16. 4)—killing a robber. In *D.* 48. 8. 9. we have a case which is in harmony, not only with common-sense, but with the principles of English Law; a person killing a thief by night is not to be exempt from criminal liability unless he were placed in peril of life.

(*b.*) *Excusable Homicide*.—Of this, two kinds are recognized in English Law, *se defendendo*, "upon a sudden affray," and, *per infortunium*, by misadventure. For instances of homicide by misadventure, *v. C.* 9. 16. 1. 1., and 5.

In concluding this sketch of Homicide, as conceived by the Roman lawyers, we may observe that the title of the 48th book of the *Digest*, *ad legem Corneliam*, briefly alludes to the defences of insanity and infancy. Infants (*i.e.* those under seven) who are, indeed, declared in the Institutes to be next-door to lunatics, and lunatics are exempted from criminal responsibility (*D.* 48. 8. 12).

In this particular the Roman Law agrees with all civilized systems of jurisprudence, though the reason given in the case of madmen is not the inability to conceive a criminal intention, as might have been expected from the stress laid upon the importance of *dolus*, as necessary to constitute criminal responsibility, but rather the harshness of fate (*fati infelicitas*) it being evidently considered unjust that persons labouring under mental affliction should undergo punishment.

T. W. MARSHALL.

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## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### Extradition.

Two important recent decisions on Extradition deserve very careful notice.

In the case of *In re Arton*, 1896, 1 Q.B. 108, a Habeas Corpus was applied for on the grounds (amongst others): (1) That the prisoner had been committed for offences of which no *prima facie* proof was disclosed by the depositions; (2) That the demand for extradition was not made by the French Government in good faith and in the interests of justice; and (3) That the offences imputed were of a political nature, and that the surrender was based on exclusively political motives.

The suggestion of prisoner's counsel as regards the last two points, was that though the offences charged were, on the face of them, non-political, yet in case of surrender, the prisoner's conviction and punishment would greatly depend upon his disclosure or non-disclosure of certain political secrets. Lord Russell, L.C.J., and Wills, J., refused the application on all the grounds. As to the first point, they considered that under the circumstances the rule had been complied with which requires the making out of "such a *prima facie* case of guilt as would entitle a magistrate to commit in the ordinary case of an offence against the municipal Law of this country."

As regards the second point, they held that it was a matter with which the Court was not competent to deal. "Such considerations, if they exist at all, must be addressed to the Executive of this country: they cannot enter and ought not to enter into the Judicial consideration of this question."

With regard to the remaining point, the Court held that the offence of a political character of which the Extradition Act, 1870, speaks must be one which has been already committed, and that there was no evidence to show that the requisition for extradition was made with a view to punish the prisoner for a political offence, or that in fact any such offence had been committed.

The other case of *In re Galwey*, 1896, 1 Q.B. 230, was also of great interest. The prisoner was admittedly a British subject, though domiciled in Belgium. The Belgian Government demanded his extradition on a charge of receiving stolen goods.

The Court held that notwithstanding he was of British nationality, he could be extradited in the usual way as a "fugitive criminal" within the meaning of sects. 2 and 6 of the Extradition Act, 1870. The British Government were under their treaty with Belgium not bound to surrender their own subjects, but this did not prevent the Executive if it chose from consenting to such extradition, and allowing it to be effected by the ordinary course of procedure. The Court distinguished the case of *R. v. Wilson*, 3 Q.B.D. 42, on the ground that by the terms of the Treaty under which that case arose, the surrender of British subjects was not optional but prohibited.

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#### Foreign Wills.

*In re Aganoor's Trusts*, 64 L.J. Ch. 521, settles authoritatively a principle hitherto not absolutely free from doubt. Romer, J., held that in questions as to the validity of a foreign will, or of any of its trusts or provisions, "the English Law adopts the Law of the domicile . . . as it stood at the time of the testator's death, and does not take any account of any subsequent change, though retrospective, which the Legislature of the foreign country may make in that Law."

The only other decision on this particular point was the familiar one of *Lynch v. Provisional Government of Paraguay*, L.R. 2 P. & D. 268, but it is to be observed that that was a case of Grant of Probate merely, and not as to the validity of the provisions of the will. Lord Penzance expressly said: "It does not devolve upon this Court to adjudicate upon the property of the deceased, but only to ascertain whether he has made a good will, and if not, to grant administration of his effects" (p. 272).

In the more recent case, the question was as to the validity of certain trusts in a will which had been duly proved in this country many years ago. The facts, which were very intricate, were, briefly stated, as follows:—

The testatrix, Maria Theresa Aganoor, was born in Madras in 1791, and subsequently in the same place was married to Abraham Aganoor, who was an Armenian by race, but born in Persia. They came to London in 1838, but soon afterwards settled in Padua, which was then under the dominion of Austria. The husband died in 1855, and was buried in a vault purchased by him at Padua. In 1855 the testatrix made a will in the English language in which she expressly described herself as a British subject. She died in 1868 in Padua.

By her will the greater part of her property, which consisted of money invested in British Government funds, was bequeathed to trustees in trust for her grandson, Alexander Bianchi, with an executory limitation over to other persons in case Bianchi died "without having legitimate children." This contingency did in fact happen, and on an originating summons for payment of the fund out of Court to the persons claiming under the executory gift over, it was contended by the personal representatives of Alexander Bianchi that they were entitled, the gift over being absolutely void as a "Substitutionary Trust" by Article 899 of the Italian Civil Code of 1865. It was proved that



the Code had superseded the old Austrian Law in Padua, after the unification of Italy. It was quite clear, moreover, that by virtue of certain Royal Decrees, known as "Transitory Dispositions," this prohibitive provision of the Code had a retro-active effect and invalidated "Substitutionary Trusts," created by wills of persons dying even previous to 1871.

It was admitted that the nationality of the testatrix was British, but it was urged that assuming that her last domicil was in Padua (which however was disputed, although the evidence was strongly in favour of the contention), the validity of her testamentary disposition would be determined by the provisions of the Italian Code and not by the Austro-Venetian Law in force at the time of death. If this contention were correct the "trust substitution" would be invalid; if, however, Austrian Law applied, the will was admittedly valid both in form and substance.

Romer, J., took a broad view of the decision in *Lynch's* case and decided that the Austrian Law, as it existed at the testatrix's death, applied.

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#### Domicil.

Two or three well-established principles as to change of domicil were illustrated in the case of *In re Smith, deceased*, 12 *Times* L.R. 223; *i.e.* (1) That the onus of proving a change of domicil of origin was on the party alleging the change; (2) That service in the army outside the original place of domicil in no way effected a change; and (3) that evidence of intention to change domicil was quite insufficient without actual change of residence.

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#### Marriage.

The case of *Culling v. Culling*, L.R. 1896, p. 116, deserves to be noted, although no conflict of Laws actually arose in it. The Court held that a marriage

between British subjects solemnized on board an English man-of-war at a foreign station by a clergyman of the Established Church, without license or banns, is valid by the Common Law of England.

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### Probate Duty on Foreign Assets.

The decision in *Att.-General v. Sudeley* referred to in our last issue, has been reversed on appeal. (See L.R. 1896, 1 Q.B. 354.) Lopes and Kay, L.JJ. (Lord Esher dissenting) held that the dicta *In re Ewing*, 6 P.D. 19, applied to the present case, and that what the testatrix was entitled to was not a share of the mortgage securities in specie, but simply a proportion of the proceeds of her husband's estate after realization.

Kay, L.J., said: "The New Zealand mortgages were not 'an asset of Frances'" (the testatrix's) "estate. Her 'executors have no right *virtute officii* to any part of such 'mortgages. Their only right in respect of them is to call 'upon the English executors of Algernon" (the husband) "to get in his residuary personal estate, convert and divide 'when the time for division arrives. That right is an 'asset of Frances' estate, whose locality is English, and its 'value, as in the case of all English assets, is subject to 'probate duty in England."

As the Master of the Rolls adopted the view already taken by the Lord Chief Justice and Charles, J., it seems probable that the case will go to the House of Lords.

In another recent case of *Stern v. The Queen*, 1896, 1 Q.B. 211, the Court, following *Attorney-General v. Bouwens*, 4 M. & W. 171, held that certificates of shares in a foreign company were liable to Probate Duty here, on the ground that such certificates were currently marketable here as securities for the shares, and that the delivery of the certificates here passed a good title to the shares.

**Service out of the Jurisdiction.**

The case of *The British Wagon Co. v. Gray*, referred to in our last issue, is now fully reported in . L.R. 1896, 1 Q.B. 35.

The case of *Badische Anilin und Soda Fabrik v. Johnson*, L.R. 1896, 1 Ch. 25, should also be noted.

JOHN M. GOVER.

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**VII.—NOTES ON RECENT CASES (ENGLISH).****Underwriting Agreements.**

SOME interesting points in connection with underwriting agreements arose recently in the case of *The Hemp, Yarn and Cordage Company* in the Chancery Division recently. The decision was to the effect that unless an underwriting agreement expressly permits it, a company is not entitled to postpone its acceptance of the undertaking contract until the time for application for shares has gone by. Assuming that a contract to take shares is void, anyone whose name has nevertheless been placed on the company's register can claim to have it removed even though the company is in liquidation. It is necessary, however, that the contract should be void, and not merely voidable. In this case, the liquidator had summoned an alleged contributory for calls. The name of the contributory had been put on in pursuance of an application for shares made in his name by the London and Northern Assets Corporation under the authority of an underwriting letter. The offer in the underwriting letter was accepted by the Assets Corporation in July, 1892, when the public subscription for shares had been closed. The point, therefore, was whether or not the authority given by the underwriting letter had not come to an end before the application for shares was signed,

and whether the contributory was estopped from saying that the authority had expired. The Court had held that the promoters were not entitled to wait to see the result of the invitation to the public and then accept the offer to underwrite after the invitation to the public had proved a failure, and the mere fact of the contributory's name being on the register, even though with his knowledge, was not, under the circumstances, sufficient to make him a member. The result of this decision shews that an underwriting agreement should be considered in the same way as any other commercial contracts, and the terms be understood according to the regulations affecting common mercantile affairs. Assuming that this is done, the rule which has to be followed is, that if an offer is not assented to within a reasonable time, it will be considered to have lapsed. By the above decision, it is laid down, that if a person intends to take up shares, assuming the public do not, then the application must be assented to prior to the application being closed, as, if not, an unreasonable time will be considered to have gone by.

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#### **District Councils and Contractors.**

The powers conferred by the Public Health Act, 1875, on the local board can only be exercised by some person or persons acting under their authority. Those persons may be servants of the local board or they may not. The local board are not bound in point of law to, themselves, do such work as that prescribed by sect. 150 of the Public Health Act, 1875, that is to say, by servants of their own. There is nothing to prevent a local board from employing a contractor to do their work for them. But the local board cannot, by employing a contractor, get rid of their own duty to other people, whatever such duty might be. If the contractor performs their duty for them, it is considered as carried out by them through him, and they are not

responsible for anything more. They are not liable for his negligence in other respects as they would be if he was their servant. Such negligence is sometimes called casual or collateral negligence. If, however, on the other hand, their contractor fails to do what it is their (the local board's) duty to do or get done, their duty is not performed, and they are responsible accordingly. In the case of *Hardaker and Another v. Idle District Council and Another*, the plaintiffs sought to make the district council liable in respect of negligence in the construction of a sewer. It appeared that notice, under the Public Health Act, 1875, to make a sewer had been served by the district council on the plaintiffs, but they (the plaintiffs) had not executed the work. The district council accordingly carried it out, employing a contractor to undertake it. The contract stipulated that the work should be executed in a workmanlike and substantial manner, subject to the directions of the district council's inspector, and that the care of the entire work, until completed, should remain with the contractor, who should be responsible for all accidents, and damage to persons or property arising from the works, and, that the contract should protect all gas-pipes which might be laid here or otherwise interfered with. Through the negligence of the contractor by insecurely packing the soil around the gas-pipe in use, after excavations had been made for the sewer, the gas-pipe was broken and the gas escaped. The person of one of the plaintiffs was injured by the explosion which resulted, and their furniture wrecked. The plaintiffs had already obtained damages against the contractor, but as there was considered to be no case against the district council, the plaintiffs carried the matter to the Court of Appeal, and there it was held that the district council was liable likewise. The duty of the district council, considered the Court in this case, in sewerage the street was not

performed by constructing a proper sewer. Their duty was not only to do that, but also to take care not to break any gas-pipes which they cut under. This involved properly supporting them. That duty was not performed. They employed a contractor to undertake their duty for them, but he failed to do so. This was not a case of collateral neglect. The case was not one in which the contractor performed the district council's duty for them, but did so carelessly. The case was one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all. Looking at the cases of *Gray v. Pullen*, 5 B. & S. 970, and *Tarry v. Ashton*, 1 Q.B.D. 314, the district council could not contend that although they might be liable to the owner of the gas-pipes they were not liable to the plaintiff, as they were under no duty to him, for in neither of those cases was the defendant under any duty to the plaintiff except as one of the public. In the present case the district council was liable to the plaintiff. The relation of the district council was not that of master and servant, and *Reedie v. L. & N.W. Railway Company*, 4 Ex. 244, and *Steel v. S.E. Railway Company*, 16 C.B. 550, supported that view. As to the remoteness of the damage, the nature of the gas, its certainty to escape and to find its way wherever it could get, and to explode if it escaped in large quantities and came into contact with fire, all rendered the breaking of a gas-main very dangerous if houses were near. The fact, moreover, that free escape upwards through the surface was greatly hindered by the hardness of the surface after it was left by the contractor, tended to force the gas laterally to some considerable distance, and very probably into some passage or place near a fire. Such an accident as had happened was only what was reasonably to be expected. Such a case as *Sharp v. Powell*, L.R. 7 C.P. 253, did not apply here. The plaintiff was, therefore, entitled to

have the district council made liable as well as the contractor.

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#### Receiving Orders and Want of Assets.

The only property which a debtor had was a life interest and which would terminate on his becoming bankrupt. On a creditor threatening bankruptcy, a suggestion was made that he (the debtor) should insure his life, and out of his income pay the premiums, and also the creditors ten shillings in the pound. The Court of Appeal, however, held that no receiving order could be made. There was here, it was considered, an evident effort on the part of the creditor to get payment of his debts from some one or other, on the ground that if the bankruptcy proceedings went on, the life interest would be gone. The creditor had clearly attempted to get an annual sum from the debtor as consideration for adjourning the petition (*Re Otway*, 1895, 1 Q.B. 812). Some doubt has been raised as to whether this case does not decide that where the debtor has no property, a receiving order cannot be made. In *Re Murietta*, 40 S.J. 317, this view of the decision was not accepted, and the Court considered that in *Re Otway supra* bankruptcy would have destroyed the only available asset, whereas in *Re Murietta* it was not improbable that before the debtor got his discharge, he might acquire some property on which he could pay his creditor. The case of *Re Leonard* (W.N. 30) shews that it is not a sufficient ground for refusing to make a receiving order in bankruptcy, that apparently the debtor has no assets available for distribution among his creditors. In this case the only asset of the debtor was an official salary, which he would lose on a receiving order being issued. During this case, the Court referred to *Re Hecquard*, 24 Q.B.D. 71, where it was pointed out that when the petition was presented and the receiving order applied for, the petitioning creditor could not tell whether or not

there would be any results from the bankruptcy. The petitioning creditor would merely prove his debt and ask for a receiving order to be made. That was not the time to go into the question of assets. After the adjudication was the time for finding out what assets the debtor had. The case of *Re Graydon*, reported in the *Times* of February 13th, will be remembered (the Great Wheel case) where assets accrued pending the discharge, as the bankrupt was receiving large sums in the way of royalties. In that case, the bankrupt had invented a certain contrivance (a great wheel) and took out patents for it, and allowed a company the use of the patented invention at a royalty of £10 per week. The Official Receiver claimed the royalties, but the Court held that they were in the nature of personal earnings, and, that the bankrupt was entitled to retain what was reasonably necessary for his maintenance, which the Court fixed at £5 per week. The solicitors' charges on the royalties given for services rendered in connection with the patent, had, however, it was held, to be paid off before the Official Receiver was entitled to take anything.

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#### **Patents, Trademarks, and Auctioneers.**

Various practical and useful decisions dealing with patents and trademarks have been dealt with by the Courts during the last quarter. In one of these cases it was laid down that the prior knowledge of an invention to avoid a patent must be knowledge equal to that required to be given by a specification, *viz.*, such knowledge as will enable the public to perceive the very discovery and to carry the invention into practical use. The invention must be shewn to have been before made known. Whatever, therefore, is essential to the invention must be read out of the prior publication. As to the rule as to when a description in writing is to be relied upon as being an anticipation, it



must be shewn that a person reading the writing would find in the writing alone a reasonably clear description of his own invention on the face of that writing, construing the writing reasonably as describing the invention. We know what is necessary if there is said to be an anticipation, not by the existence of an actual thing, but by description, either in a specification or otherwise, that the description must be of such a character as to enable anyone competent to make the machine for which protection is claimed from the description given. In the case of the *Shrewsbury and Talbot (S.T.) Cab Company, Limited v. Sterckx*, the defendant claimed that plaintiffs' patent, which had been assigned to them (the plaintiffs) had been anticipated by one of 1862, but the Court held that the patent of 1862 neither anticipated nor imported such information as to render invalid plaintiffs' patent of 1883 either on the ground of no invention or no novelty. The sufficiency of an invention has been frequently argued in the Courts. In a recent case a lady brought an action for infringement of her patent for a new or improved appliance for fastening a lady's hat upon the wearer's head, which the plaintiff had placed on the market under the name of the Breeze Hat Grip. The plaintiff claimed as the subject of the patent a flexible strip of metal or other material having teeth like a comb, which might be sewed or fastened inside a lady's hat, and which teeth caught under the hair and held the hat in position on the head of the wearer. The defendants had put on the market a Securemos Retainer Hat Grip, and on plaintiff bringing this action contended that plaintiff's hat grip displayed no invention sufficient for a patent, and that it had been anticipated. The plaintiff's invention was, however, upheld in this case of *Savage v. Harris* by the Chancery Division. It was pointed out by the Court that the plaintiff's invention consisted of a combination of known things. There was nothing new except the putting of the whole together. The

chief part of the invention was the flexibility of the back or band which assimilated itself to hats of different sizes. There was here just sufficient invention to support the patent and the case fell within the border line. The decision was, therefore, in favour of plaintiff, as the Court considered that defendants' article was made substantially according to plaintiff's specification. In an ordinary action for deceit between two rival traders, the defendant, as a rule, is alleged by the plaintiff to be passing off the defendant's goods as those of the plaintiff, by means of labels, wrappers, and the like. The plaintiffs in such a case are entitled to shew that there is sufficient imitation of their goods to justify their action, and they can rely on the general appearance of the defendant's goods when viewed as whole, and can claim an injunction restraining the defendants from using words or devices in colourable imitation of those of the plaintiffs. These rules, which apply to all ordinary actions of deceit as between rival traders, were adopted by the Court in the case of *The London General Omnibus Company (Limited) v. Felton*. There the plaintiffs sought and obtained an injunction restraining the defendants from using omnibuses having painted, &c., thereon words, panels, or devices in colourable imitation of those on the plaintiffs' vehicles. The plaintiffs contended that the rival omnibuses when looked at as a whole gave the irresistible inference that they were copied from the plaintiffs' omnibuses, and, the Court considered and held that though the plaintiffs could not claim any monopoly in the construction of the omnibuses, yet the defendant was not entitled to arrange the general appearance of his omnibuses so as to mislead the public in the way complained of by the plaintiff. There were indications of copying, and such things in themselves small, were nevertheless *indicia*. A proprietor of an omnibus, or, indeed, of any mercantile goods, might use many things which were allow-

able, but must not use all these things in such a way as to pass off his own omnibus or goods for that or those of another proprietor. On this subject may be consulted the cases of *Seixo v. Provezende*, L.R. 1 Ch. 192, and *Montgomery v. Thompson* [1891] A.C. 217. The Crown would be a favourite subject as a design for a trademark, but though there is no actual rule which binds the Court or the Board of Trade and prohibits the registration of the representation of a Crown as a trademark, yet there are some printed instructions issued by the Comptroller which shew that the Royal Arms, or arms so nearly resembling them as to be calculated to deceive, and representations of the Royal Crown cannot be registered as trademarks, or as prominent parts of trademarks, unless the marks have been in use prior to 13th August, 1875. In *Re König and Ebhardt's Trademark*, it was sought to register a mark containing a representation of a Crown the same as that of a Marquis. The registration sought was in class 39, and the trademark consisted of a shield bearing a floral device and the words "*urbi et orbi*," over which was a coronet. The Court allowed this registration to proceed on condition that the applicants disclaimed the right to their crown and the words "*urbi et orbi*." It was pointed out by the Court in this case, that only representations of the Royal Crown as usually known, viz., a circlet surmounted by two arches were forbidden, and, in this instance, the device in the mark did not so nearly follow the Royal Crown as to be deceptive. In auctioneering circles, a curious tale with regard to the sale of a patent is told. A firm of auctioneers offered for sale, by order of the liquidator, a batch of patents for drying grains and other substances *in vacuo*. Only one solitary bid of £10 was forthcoming. The acting vendors declared they had come to sell, the hammer fell, and the purchaser paid for his patents on the spot. The consternation of the auctioneer

may be imagined when the purchaser blandly informed him that the original price paid for the patents was £120,000.

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### **Principals, Agents, and Commercial Travellers.**

The question as to the due and proper commission payable by principals to their agents or commercial travellers, appears to require frequent consideration by the superior courts. The point as to the commission payable to an agent arose in the case of *Morris v. Hunt*. The facts of the case shewed that a firm of engineers engaged an agent to obtain orders for shafting and other parts of machinery. There was a letter written by the firm to the agent which was alleged to form the contract, and with the contract was a table of firms of possible customers on whom it would be the duty of the agent to make visits. The other parts of the letter, which are material,\* stated thusly:—"We shall be pleased to allow you 5 per cent. discount on all orders received from the firms named (except those marked 'not call') and on any fresh ones you can introduce. You will keep a record of your calls, and send us particulars from time to time, for which purpose we send you a manifold book." As differences arose between the firm and the agent, the latter was dismissed, his commissions being paid for one month after dismissal. In addition to getting orders from the firms indicated in the table, the agent had likewise introduced fresh customers, and, accordingly on his dismissal, it was his contention, that he could receive commissions on all business since done with the customers he had obtained. He also argued that he could claim for life all commissions on all such orders, and his executors were entitled to make a claim after his death. On this point reference was made to the case of *Bilbee v. Hesse & Co.*, 5 T.L.R. 667, subsequently affirmed by the Court of Appeal. In the present case, however, the Court

held (see 12 T.L.R. 187) that there was not an implied term of the contract that the plaintiff's right to commission should continue after his dismissal in respect of all orders accepted by the defendants from customers from whom he had obtained orders before his dismissal, whether from persons not named in the original list or from persons named therein. The defendants would not, however, have been justified in putting an end to the agreement had they chosen to do so without notice. The result of this decision was accordingly to favour the defendants. This decision should, however, be compared with that given in the case of *Salomon v. Brownfield*, which has laid down the rule apparently that a commercial traveller who introduces business has a right to commission after dismissal if the contract is not definite as to time. In that case the defendants, a firm of pottery manufacturers, had engaged the plaintiff as their agent to travel for them in Australia. The terms agreed on were that the agent was to have  $7\frac{1}{2}$  per cent. upon the net amount of cash in payment of goods, orders for which were booked through him, also  $7\frac{1}{2}$  per cent. upon all orders from customers introduced by him on payment being made by them, whether such orders were obtained through the plaintiff's representation or not. The commission was duly paid until the end of 1894, but in 1895 three months' notice was given to the agent to terminate his contract. The agent claimed to be paid a commission upon all orders from customers in Australia introduced by him, as the contract was indefinite as to time. The plaintiff's claim was, therefore, for a declaration of his rights under the contract and damages for wrongful dismissal. The case is reported 12 T.L.R. 239, the Divisional Court held that no period was put to the duration of the contract, the reason being that payment should be made upon all orders received from customers introduced by the plaintiff, and it was open to the defendants to cease

dealing with the customers introduced. The plaintiff, therefore, obtained his declaration that he could receive  $7\frac{1}{2}$  per cent. upon all orders obtained and paid for from customers introduced by him, but as regards the damages sought for, as the defendants had paid a sum into Court, and the plaintiff had taken it out, the Court gave him nothing further.

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### Trades Unions and Picketing.

A definition as to how far workmen can carry a strike, accompanied by picketing, has been given in the Court of Appeal in the case of *Lyons v. Wilkins*. Some workmen (the plaintiff's hands), in the fancy leather trade, went on strike. They afterwards not only picketed plaintiff's place but threatened another employer (an outside firm) with whom they had no dispute, that if he, the outside firm, dealt with the plaintiff, they, the workmen, would bring out the outside firm's hands and picket the place. The defendants were the secretary and a number of the Executive Committee of the Amalgamated Society of Fancy Leather Workers. The plaintiffs applied for an injunction in the Divisional Court to restrain the defendants from inducing, or conspiring to induce, persons not to enter into contracts with the plaintiffs, and the Court granted the injunction. The defendants took the case to the Court of Appeal, and submitted that there was no evidence whatever of malicious intention, and that a strike on the part of the workmen being legal, it could not be illegal to induce persons to do a legal act. The respondents pointed to the facts of appellants causing workmen to leave another employer in order to injure respondents, by preventing that employer doing work for them, and those were malicious acts which justified the injunction. The Court of Appeal adopted the respondent's views and rejected the

appellants' contention. The appellants were committing an illegal act which might have the effect of ruining the business of the respondents if it was not interfered with by injunction. This trade union had gone far beyond any right which the Statute gave them, and what they were doing was calculated and intended to injure the plaintiffs in their business. An injunction was accordingly issued to restrain the defendants, their servants and agents, from watching or besetting the plaintiffs' works for the purpose of persuading, or otherwise preventing, persons from working for them, or for any purpose except merely to obtain or communicate information, and also from preventing other persons from working for the plaintiffs by withdrawing workmen from the employment of those persons. This decision, therefore, affirms the fact that an employer selling his products to another employer, who happens to have a dispute with his hands, shall not render him liable to be struck against for doing so. Amongst the arguments of the appellants was that, amongst the acts done by the pickets, was one merely to wait about the premises and try to persuade would-be applicants for work to go away. This point as to persuasion was not a sound one, for though when the Statute dealing with picketing was going through Parliament it was stated that "peaceful persuasion" would be permitted, yet there was no sanction given to this view when the Act was actually passed. Picketing, being confined only to the obtaining or giving information, is, therefore, now not of much practical use. For new workers at a place where a dispute is going on soon have all information given them, and can obtain information by using their eyes. A point on the law of evidence, when the case was in the Divisional Court, was whether the statements made by the pickets employed by the Executive Committee might be put in evidence against the defendants. The pickets were employed by the defendants to prevent persons from

working for the plaintiffs. That they might do by fair persuasion, or they might do it by intimidation, which would be wrong. What passed in conversation between persons employed as pickets and others was part of the *res gestæ*, and was admissible in evidence, and the defendants could not be made irresponsible for the acts of the picket they employed. The following cases were referred to:—*Temperton v. Russell*, [1893] 1 Q.B. 715, 9 T.L.R. 393; *Flood v. Jackson*, [1895] 2 Q.B. 21, 11 T.L.R. 335, and the *Mogul Case*.

T. F. UTTLEY.

## Books Received.

*The Land Laws*. Third Edition. By Sir Frederick Pollock, Bart. Macmillan and Co., London, 1896.

*Reports of American Bar Association*. Vol. XVIII. Dando Printing and Publishing Co., Philadelphia, 1895.

*An Epitome of Mahomedan Law*. By Chhotálál Karsandas Mulji and F. A. Ráná, B.A., LL.B. The "Examiner Press," Bombay, 1895.

*Memorials of Mr. Serjeant Bellasis*. By Edward Bellasis. Second Edition. Burns and Oates, Limited, London, 1895.

*De Staatsleer van Hegel en hare toepassing*. By Van Vredenburg. P. Den Boer, Utrecht, 1896.

*A Treatise on the Law Relating to Electricity*. By Simon G. Crosswell. Little, Brown and Co., Boston, 1895.

*Anarchy or Government*. By William Mackintyre Salter. Thomas Y. Crowell and Co., Boston and New York, 1895.

*Hand-Book on the Law of Torts*. By Edwin A. Jaggard, A.M., LL.B. (Hornbook Series). Two Vols. West Publishing Co., St. Paul, 1895.

*American and English Decisions in Equity*. Vol. I. First Series (Annual). Notes by Henry Budd. M. Murphy, Philadelphia, 1895.

*Illustrative Cases upon Equity Jurisprudence*. By Norman Fetter. West Publishing Co., St. Paul, 1895.

*Recollections of Lord Coleridge*. By W. P. Fishback. The Bowen-Merrill Co., Indianapolis and Kansas City, 1895.

*Green's Encyclopædia of the Law of Scotland*. Edited by John Chisholm, M.A., LL.B. Vol. I. William Green and Sons, Edinburgh, 1896.

*A Practical Treatise on the Law Relating to The Grand Jury in Criminal Cases, The Coroner's Jury, and the Petty Jury in Ireland*. By William G.



Huband, Barrister-at-Law. Edward Ponsonby, Dublin, and Stevens and Sons, Limited, London, 1896.

*Martindale's American Law Dictionary* (Annual, 28th Year). By J. B. Martindale, Chicago, 1896.

*Illustrative Cases in Torts* (Pattee Series). By James Paige. T. and J. W. Johnson and Co., Philadelphia, 1896.

*A Collection of Cases on the Measure of Damages*. By Joseph Henry Beale, Junr., Assistant Professor of Law in Harvard University. Little, Brown and Co., Boston, 1895.

## Reviews.

*The Grand Jury in Criminal Cases, the Coroner's Jury and the Petty Jury in Ireland*. By WILLIAM G. HUBAND, Barrister-at-Law, formerly Scholar and Senior Moderator, Trinity College, Dublin. Dublin: Edward Ponsonby. London: Stevens and Sons, Limited. 1896.

This is a valuable treatise on the subject of Juries. We observe that the writer does not treat of the fiscal powers exercised by Grand Juries in Ireland, but has wisely confined his book to their authority in criminal matters. The first chapter contains an historical statement of the growth and development of the three kinds of Juries, and omits nothing of importance of the history of Juries, so far as Great Britain is concerned. In the subsequent chapters the cases cited are for the most part English decisions, and these chapters deal with questions of Law strictly cognate to Juries, such as Trial at Bar, Venue, Place of Trial in Civil Actions, Qualification of Petty Jurors, Special Juries, View, Summons of the Jury, Calling and Swearing the Jury, Challenge, Trial, Verdict, Costs and Expenses of the Jury, New Trial in Criminal Cases. A useful Appendix of Statutes relating to Juries in Ireland completes this useful and exhaustive treatise.

The author has adopted a new departure in stating the facts of every reported case which he cites, condensing the statement as much as possible, and frequently citing a portion of the judgment. This is so well done that it is bound to prove very valuable on Circuit; for a text-book, which merely cites names of reported cases, is necessarily of very limited use when Reports are not within reach.

It should be observed that except where modified by Statutes applying to Ireland only, the Irish Jury Laws are the same as those of Great Britain. It is therefore obvious that the book will be useful to practitioners both of Great Britain and of the sister country.

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*Green's Encyclopædia of the Laws of Scotland.* Edited by JOHN CHISHOLM, M.A., LL.B. Advocate, and of the Middle Temple, Barrister-at-Law. Vol. I. Edinburgh: William Green and Sons. 1896.

This is the first volume of a Law Encyclopædia proposed to be completed in twelve volumes. The book before us begins with "Abandoning" and ends with "Banker's Lien." A list at the beginning of the Volume gives us the names of the writers of the various Articles, and among them we notice The Lord Justice-Clerk (the Right Hon. J. H. A. Macdonald); Professor Macintosh, of Edinburgh University; Professor Rankine, of the same University; Professor Sir Ludovic J. Grant, Bart., of the same University; Professor J. Kirkpatrick, of the same University, and other distinguished persons. It is undoubtedly a great advantage for legal practitioners in Scotland to have the means of informing themselves of the particulars of their law so readily. We cannot doubt that this new work is the most comprehensive law book ever published in Scotland, and it is obvious that no expense or trouble has been spared in the endeavour to secure the services of the highest living authorities. After a careful examination of the Volume we have been unable to find any error of moment, and we have no hesitation in pronouncing it to be most valuable, not only to practising lawyers, but also to members of Parliament, landowners, and public bodies generally.

*Select Cases from the Coroners' Rolls, A.D. 1265—1413, with a Brief Account of the History of the Office of Coroner.* Edited for the Selden Society by CHARLES GROSS, Ph.D. London: Bernard Quaritch. 1896.

We hail with pleasure another publication of the Selden Society. The early history of the Office of Coroner has not hitherto been satisfactorily investigated by writers on our Law; it has been usually ascribed to the passage in the Articles of Eyre of 1194,

viz. :—*Præterea in quolibet comitatu eligantur tres milites et unus clericus custodes placitorum coronæ.* The learned editor of the work before us, who has displayed great care and judgment, is of opinion that there is evidence that coroners, both of boroughs and of counties, existed before the above date; for example, the citizens of Norwich claimed to have appointed such officers from the reign of Stephen. The functions of coroners are described to have been those of holding inquests on the bodies of those supposed to have died by violence or accident, and on the bodies of those who died in prison; also to hold inquests in cases of serious bodily injury, rape, prison-breach, and concealment of treasure-trove. They also received declarations of approvers, heard "appeals," and recorded exigents and outlawries; they were the principal agents of the Crown in bringing criminals to justice, in fact the chief guardians of the peace in each county. The Rolls collated extend from 49 Henry III. to Richard II., and refer to 17 counties besides some "appeals" in the City of London. We regret, however, that we fail to notice any reference to fire inquests. That the coroner had power to hold such inquests was clearly shewn in an exhaustive article on that subject in this Magazine (May, 1887), condemning the judgment of the late Sir Alexander Cockburn in *R. v. Herford* in 1860. Of course we do not find any reference to the inquests of the Admiralty coroner, for his inquisitions would not be entered on these Rolls. The work is full of interest, and we are confident will do much to throw new light on the subject of coroners.

*The Students' Legal History.* By R. STORRY DEANS, of Gray's-Inn, Barrister-at-Law. London: Reeves & Turner. 1896.

It is a not uncommon failing among members of the Bar that they do not understand the older jurisprudence of this country, nor the chain of facts which gave rise to modern enactments. It is not everyone who has made a study of Constitutional Law and Legal History. The book before us presents in a small compass the chief landmarks of our Law from the time of the Saxons to the present day; and although it is modestly called a book for the use of students, many of our older practitioners, whom we refrain from naming, would do themselves much good were they to peruse its pages. The author has succeeded in

giving a *précis* of the subject in something like 250 pages, including a Chronological Table; perhaps in his desire to be brief, he has unduly pared away the rind; this is a fault which we hope will be amended in a future edition.

*An Epitome of Mahomedan Law.* By CHHOTÁLÁL KARSANDÁS MULJI and F. A. RANA, B.A., LL.B., Vakils of the High Court. Bombay: at the "Examiner Press." 1895.

This is a companion volume to the *Epitome of Hindu Law*, which we mentioned in our last number, and is compiled by the same writers; the object of the book being to present in a concise form the most important principles of the chief Schools of Law and to illustrate the same by apt cases. The book is mainly intended for students, and we may congratulate the authors on the complete and careful manner in which they have carried out this useful work.

*The Land Laws.* By Sir FREDERICK POLLOCK, Bart., Barrister-at-Law, M.A. Third Edition. London and New York: Macmillan & Co. 1896.

More than thirteen years have elapsed since the First Edition of this book was issued from the London Press. A Second Edition was published in 1887. We are now the heralds of a Third Edition. We must mention that some Addenda were made to a re-issue of the Second Edition in 1893. The present edition, however, is not a mere revision of the Second Edition so re-issued. The author informs us that he has found it necessary to re-write a good deal of the chapter on Early Customary Law (Chapter II.), to alter much of the Appendix, and to add an entirely new note on the origin of the Manor (Note C), in order to keep the antiquarian part of the book abreast of the present state of scholarship. So far, the present edition contains additional matter of a supplemental character, but we must not suppose that the author has thrown much new light on the Anglo-Saxon period of our legal history in his chapter on Early Customary Law; he has himself avowed the negative character of his book in that respect, but he

qualifies that avowal by observing that we probably know more on certain points than we knew a dozen years ago, namely, that on those points we really know less than we formerly supposed ourselves to know.

This is rather a discouraging view of the results of the author's study of the Anglo-Saxon period, but the reader must bear in mind that the author is one of the new Germanistic School of English Jurists, who hold that the theories of the Romanistic School, in which Sir William Blackstone was formerly a trusted guide, are worthless. For instance, Blackstone held that copyhold tenure was a mediæval encroachment on the Lord's Estate. Sir Frederick Pollock, on the other hand, teaches us that copyhold tenure is a primitive usage, which has come down to us from a forgotten condition of society, and has survived not only the Norman, but the English conquest of Britain. We mention this to assure our readers that the subjects discussed in this book are subjects of high judicial interest, and we may add that the author's additions to the earlier editions of the book have considerably enhanced its value.

*Le Gouvernement Local de L'Angleterre.* By MAURICE VAUTHIER, Advocate of the Court of Appeal, Brussels. Paris: Arthur Rousseau. 1895.

It is interesting "to see ourselves as others see us," and here we may to some degree realize this *desideratum*. The writer gives the reader some account of our Local Government, beginning with the history of Shires, Hundreds, and Boroughs, passing on to Justices of the Peace, Copyholders, and Sheriffs. He then touches on Petty Sessions, Quarter Sessions, *Mandamus*, and Special Cases. We also have his views on County Councils, the Constabulary, Vestries, Churchwardens, and Poor Law Relief, finishing up with School Boards, the City of London, and with that individual dear to all foreigners, viz., the Lord Mayor. The writer appears to have made himself adequately acquainted with the subjects on which he has treated, and the book may well be recommended to foreigners who desire to obtain some knowledge of our English legal authorities.

*Notas Sueltas sobre la Pena de Muerte.* By Q. NEWMAN. Santiago de Chile: Enquadernazion Barzelona. 1896.

This is an argument in favour of capital punishment, supported in an appendix by a translation of an article by Mr. F. H. Bradley in the *International Journal of Ethics* (Vol. IV., p. 269). It is startling to find that the percentage of murders in Chili is 96·66 for every 100,000 inhabitants, while in the most homicidal country in Europe—Italy—it is only 15·40, and in England only 1·60. Under these circumstances it is perhaps not surprising that Señor Q. Newman thinks the present very lax system of imprisonment in Chili insufficient as a deterrent. The spelling throughout the book is on a new and improved (?) orthographic system. The old-fashioned Spanish scholar is apt to stare in amazement at *agtibidad*, *qatólíqa*, *zibil*, *zingo*, though after a little practice he is able to guess what they would be in the effete old Spanish to which he is accustomed. The doubled R at the beginning of words reminds us of the Poema del Cid or Gonzalo de Berceo, while the B for V (as in *Balparaiso*) suggests recollections of Scaliger's famous jest that Spain was a happy country, for in it *viver* and *biber* were the same.

*Memorials of Mr. Serjeant Bellasis.* By EDWARD BELLASIS, Lancaster Herald. Second Edition. London: Burns & Oates, Limited. 1895.

The first edition of this work was issued in 1893, and we are pleased to find it succeeded so soon after by this the second edition. Although the Life of the late Serjeant is written rather from the aspect of a kind father, a good husband, and a man of exemplary piety, the professional view of this eminent lawyer is not neglected. His legal career from his call to the Bar at the Inner Temple, his practice at the Chancery Bar, and his work before Parliamentary Committees are well shewn forth. The book is full of interest, but serves to encourage a belief in the mediæval maxim:—*Advocatus sed non latro, O res miranda populo!*

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*De Staatsleer van Hegel en hare Toepassing.* By WILLEM CAREL ADRIEN BARON VAN VREDENBURCH. Utrecht: P. den Boer. 1896.

This is a thesis for the degree of Doctor in *Staatswetenschap* in the University of Utrecht, which was to have been discussed

before the Faculty of Law on the 20th of March last. The result we unfortunately do not know, but Baron van Vredenburg ought to have been successful, as his work is a scholarly discussion on the political philosophy of Hegel. The philosophy of Hegel is particularly interesting to Englishmen, as he was driven by the political circumstances of the time to look to the English Constitution as the nearest approach to the ideal State. World-history is the development of the conception of freedom, and such development, chiefly owing to the happy combination of the theoretical and the practical in the English character, is to be seen at its best in England. Germany he despaired of; *Deutschland ist kein Staat mehr* are his mournful words; in England alone can be found the true constitutional monarchy where the king is the dot on the i.

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# Quarterly Digest,

BY

THOMAS J. BARNES, OF THE MIDDLE TEMPLE,  
BARRISTER-AT-LAW.

## INDEX.

Where a case has already been given in the Digest\* for a preceding quarter, the additional report is given after the name of the case, with a reference to the volume of the Digest in which it first appeared, the thick number being the number of the volume.

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# Quarterly Digest.

OF

ALL REPORTED CASES,

IN THE

Law Reports FOR FEBRUARY AND MARCH, 1896,

AND IN THE

Law Times FOR JANUARY, FEBRUARY, AND MARCH, 1896.

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## Administration:—

- (i.) **C. A.**—*Tenant for Life and Remainderman—Apportionment.*—A testator left all his property to trustees to sell, to pay the income to his wife during widowhood, and to hold the corpus for his nephews. All income from the estate in its actual condition, but no part of the estate not producing income, was to be treated as income. In satisfaction of a debt due to the testator the trustees accepted a mortgage on a life policy, subject to prior charges. No interest was paid on this mortgage, and when the policy was realised it produced barely sufficient to pay the principal of the debt. *Held*, that the sum realised was arrears of interest as well as principal, and must be apportioned between the widow and the nephews.—*Hart v. Stone*; *re Hubbuck*, 73 L.T. 738.
- (ii.) **C. A.**—*Annuity—Opposition to Distribution of Residue—Jurisdiction—Useless Appeal—Costs to be paid by Solicitor*—O. lxv., r. 11.—Even against the opposition of an annuitant the Court will, in the administration of a testator's estate, exercise the jurisdiction which it possesses to order the residue to be distributed when ample provision has been made for securing the annuity. Judgment of Court below confirmed. A solicitor was ordered, under O. lxv., r. 11, to repay to his client the costs of an appeal which, in the opinion of the Court, was brought for his own ends.—*Harbin v. Masterman*, L.R. [1896] 1 Ch. 351; 73 L.T. 591.
- (iii.) **C. D.**—*Finance Act, 1894—Appointment—Specific Share—Residue—Estate Duty and Costs Charged to Beneficiaries.*—Where under power of appointment in a marriage settlement there had been bequeathed to one person a legacy out of notional real estate and the remainder had been given to another, it was *held* that the burden of the duty and of the costs was to be borne by the beneficiaries in proportion to their shares.—*Cartwright v. the Duc del Balzo*; *re the Countess of Orford*, L.R. [1896] 1 Ch. 257; 73 L.T. 681.

**Adulteration:—**

- (i.) **Q. B. D.**—*Sale of Food and Drugs Act, 1875—Insufficient Certificate.*—A certificate of a public analyst which stated that a milk sample submitted to him "contained the percentage of foreign ingredients as under: five per cent. of added water" was held to be insufficient under the Act as it did not state the facts on which he came to the conclusion; the thing said to be added being one of the constituents of the article analysed.—*Fortune v. Hanson*, L.R. [1896] 1 Q.B. 206.

**Bankruptcy:—**

- (ii.) **C. A.**—*Bankruptcy Act, 1883, s. 162, sub-s. 2—Trustee Act, 1888, s. 8, sub-s. 1—Trustee—Account Required by Board of Trade.*—Sect. 162 sub-s. 2 of the Bankruptcy Act applies to a trustee or any other person empowered to receive or distribute funds under an Act of Parliament, and the Board of Trade may, without shewing that he has had undistributed money under his control, require him to submit an account, and a trustee in bankruptcy is not protected by the Trustee Act, 1888, sect. 8, sub-s. 1.—*Re Cornish*; *e.p. the Board of Trade*, L.R. [1896] 1 Q.B. 99; 73 L.T. 602.
- (iii.) **Q. B. D.**—*Bankruptcy Act, 1883, s. 104—Order Rescinded—Discharge.*—Where a debtor had for ten years complied with an order to set aside for his creditors all his earnings beyond a fixed sum, it was held that it was not for the interest of the State that a citizen should remain under such a burden, and the bankrupt was granted his discharge.—*Re Durnford*; *e. p. Durnford*, 73 L.T. 583.
- (iv.) **Q. B. D.**—*Bankruptcy—Costs of Appeal in Bankruptcy and in Chancery—No Set-off.*—Costs of appeal from the County Court in bankruptcy to the High Court cannot be set-off against costs of appeal to the High Court from the Chancery side of the County Court.—*Bassett re*; *e. p. Lewis*, 73 L.T. 736; L.R. [1896] 1 Q.B. 219.

**Bastardy:—**

- (v.) **Q. B. D.**—*Bastardy Laws Amendment Act, 1872, s. 3—Absence of Alleged Father from England.*—Where an alleged father quitted the country prior to the birth of the child and remained abroad till it was fifteen months old, it was held, that he came within sect. 3 of the Act, and that the magistrates had jurisdiction where a summons was taken out before the expiry of twelve months from the date of his return.—*Reg. v. Evans*, L.R. [1896] 1 Q.B. 228.

**Bill of Exchange:—**

- (vi.) **C. A.**—*Foreign Bill—Negotiation—Payment in Error—Claim for Repayment.*—A merchant in Morocco, the indorsee of a bill of exchange payable in Antwerp, indorsed the bill to the respondents, his London agents, for collection; and they indorsed it for the same purpose, with certain accompanying special instructions, to the appellants, who sent it, with the like object, to their agents in Antwerp. The bill was not met, but, by a mistake of their own, the appellants informed the respondents that it had been honoured, and paid them the amount, and the respondents immediately communicated to their principal that the money had been received and credited to him. Held (confirming the judgment of Mathew, J.), that on the facts the appellants "could not recover.—*Deutsche Bank (London Agency) v. Beriro & Co.*, 73 L.T. 669.

**Colonial Law:—**

- (vii.) **P. C.**—*Law of New South Wales—Water Supply Board—Rateability of Land—Stat. 55, Vict. No. 27.*—In virtue of a local Act, empowering

the appellants, a Water Supply Board in New South Wales, to levy a rate "in respect of lands and tenements distant not more than sixty yards from any main," although "not actually connected with any main," they claimed to rate the respondents on their entire extensive holding, over a corner of which a main was carried without affording supply. The judgment of the Supreme Court of New South Wales, to the effect that the respondents' land outside the limit was not liable, although included in one holding, was confirmed.—*Hunter District Water Supply Board v. Newcastle Wallsend Coal Company*, L.R. [1896] A.C. 82; 73 L.T. 541.

- (i.) **P. C.**—*Statutes of Ontario*, 1887, c. 184, s. 495.—A power conferred by statute on a colonial municipal body to make bye-laws for the government of a trade does not import the power to prohibit the exercise of the trade.—*Municipal Corporation of City of Toronto v. Virgo*, L.R. [1896] A.C. 88.

**Company:—**

- (ii.) **Q. B. D.**—*Companies (Winding up) Act*, 1890, s. 10—*Misfeasance—Directors—Auditors.*—Misfeasance covers all misconduct of an officer of a company for which, as such, he could be sued apart from sect. 10 of the Act; and therefore an auditor is guilty of it who from lack of ordinary skill and diligence passes false accounts, causing pecuniary damage to the company for which he acts. Directors may act reasonably in accepting as conclusive of the value of stocks, certificates furnished by their manager; but auditors would not be entitled to rely on such certificates if an ordinary careful examination of the books ought to have made them suspect their accuracy. Directors who have exercised an honest, but over sanguine judgment, are not liable for the payment of dividends which subsequent events shew were not earned.—*In re Kingston Cotton Mill Co., Limited*, No. 2, L.R. [1896] 1 Ch. 331; 73 L.T. 745.
- (iii.) **C. D.**—*Misrepresentation—Recision of Contract to take Shares.*—To make a company liable for misrepresentations inducing a contract to take shares from it, the shareholder must generally bring his case within one of the following heads:—1. Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf. 2. Where the misrepresentations are made by a special agent of the company while acting within the scope of his authority. 3. Where the company can be held affected before the contract is complete with the knowledge that it is induced by misrepresentations. 4. Where the contract is made on the basis of certain representations, whether the particulars were known to the company or not, and it turns out that some of those representations were material and untrue.—*Lynde v. Anglo-Italian Hemp Spinning Co.*, L.R. [1896] 1 Ch. 178.
- (iv) **C. A.**—*Fraudulent Prospectus—Fraudulent Telegram after Allotment—Purchase of Shares on Market—Damages.*—The directors of a company caused, after allotment, the publication in a newspaper of news false to their knowledge by which one of the public, to whom they had before allotment sent a prospectus containing known fraudulent statements, was induced to purchase shares in the company on the market. Held, that the subsequent false statement kept alive the fraudulent prospectus, and formed with it a continuous fraud entitling to remedy a person who had been induced thereby to act upon the falsehoods to his injury.—*Andrews v. Mockford and Others* (No. 1), L.R. [1896] 1 Q.B. 372; 73 L.T. 726.

- (i.) **Ch. D.**—*Contract for Sale of Shares—Transfer to Volunteer—Specific Performances.*—A contract for sale of shares in a company can be enforced against a volunteer to whom the shares have been subsequently transferred by the vendor.—*Graham v. O'Connor*, 73 L.T. 712.
- (ii.) **C. A. & Ch. D.**—*Interest out of Capital on Prepaid Calls.*—Articles of Association of a company gave directors power (on which they acted) to receive, and to allow interest out of capital on, payments in advance of call, but prohibited payment of dividends except out of net profits. *Held*, that the interest was a valid debt of the company payable out of assets and not solely out of profits, and that payment of such interest out of capital was not a return of capital to the shareholders.—*Lock v. Queensland Investment and Land Mortgage Co.*, L.R. 1 Ch. 397; 73 L.T. 708, 720.

### Contract:—

- (iii.) **Commercial Court.**—*Goods Sold for Future Delivery—Repudiation by Purchaser—Admission of Repudiation by bringing Action—Measure of Damages.*—Where a contract for cargo of goods to be delivered at a future time was repudiated by the buyer, and the repudiation was tacitly accepted by the seller bringing an action for damages for non-acceptance, it was *held* that the measure of damages was the difference between the market price of the goods at the date of contract and at the date of acceptance of repudiation, and was not to be aggravated by postponement of the sale till the goods actually arrived in port at a later date.—*Roth & Co. v. Taysen, Townsend & Co. and Grant & Co.*, 73 L.T. 628.

### Copyright:—

- (iv.) **H. L.**—*Patents—Designs and Trade-Marks Act, 1883—Infringement of Design.*—A design registered is protected, although one of its details is not new; and though the owner places on the articles which he supplies numbers in addition to the registered number. After the term of protection has expired the original design may be copied, even though before expiry the owner has registered a variation if this is of an unimportant character.—*John Harper & Co., Limited v. Wright and Butler, Lamp Manufacturing Co., Limited*, L.R. [1896] 1 Ch. 142.
- (v.) **C. A.**—*Copyright Act, 1882—Stock Exchange Price List—Newspaper—Copyright—Inducing Breach of Contract.*—The plaintiffs purchased information from the Stock Exchange which they published in their own registered newspaper and transmitted to their own subscribers, who were under contract not to supply it to non-subscribers. The defendants, who had ceased to be subscribers, induced a subscriber to furnish them with the information, which they thereupon published for the use of their own customers. *Held*, that if the defendants published the information after the time of publication of plaintiffs' newspaper there was an infringement of copyright; that if they published it prior to the publication of the newspaper, there was an invasion of plaintiffs' proprietary rights; and that the procuring by the defendants of the breach of contract gave a right of action to the plaintiffs as necessarily causing damage.—*Exchange Telegraph Co. v. Gregory & Co.*, L.R. [1896] 1 Q.B. 147; 74 L.T. 83.

### Criminal Law:—

- (vi.) **Q. B. D.**—*Cruelty to Animals Acts, 1849, ss. 2, 29, and 1854, s. 3.—Tame Seagull.*—A tame seagull is not a "domestic animal" within the meaning of the Acts.—*Yates v. Higgins*, L.R. [1896] 1 Q.B. 166.

- (i.) **C. C. R.**—24 & 25 Vict., c. 100, ss. 42, 46—*Common Assault—Proceedings Unauthorised by Person Assaulted—Jurisdiction of Justices and of Grand Jury.*—An indictment for common assault can be preferred without the authority of the person aggrieved, and where the grand jury have found a true bill in an offence not within the Vexatious Indictments Act, proceedings before the magistrate are unnecessary.—*Reg. v. Gaunt*, 73 L.T. 585.

**Crown:—**

- (ii.) **C. A.**—*Military Service—Tenure.*—Military and naval officers cannot enforce in a court of law an engagement made with the Crown for their services.—*Mitchell v. Reg.*, L.R. 1 Q.B. 121.
- (iii.) **C. A.**—*Appointments in the Public Service—Tenure.*—Appointments, military and civil, in the public service are held during the pleasure of the Crown, unless there is some statutory provision for a higher tenure.—*Dunn v. The Queen*, L.R. 1 Q.B. 116; 73 L.T. 695.

**Custom:—**

- (iv.) **Ch. D.**—*Custom Laid in Inhabitants of more than one Parish—Claim to Right of Recreation.*—A claim to a right of recreation on a particular portion of land based on a custom which is laid in more than the inhabitants of one parish, manor, or other division known to the law in the part where the property is situate is bad in law.—*Edwards v. Jenkins*, L.R. [1896] 1 Ch. 308; 73 L.T. 574.

**Divorce:—**

- (v.) **P. D.**—*Matrimonial Causes Act, 1857, s. 22—Judicial Separation—Alimony—Injunction.*—When an order for alimony, *pendente lite*, had been made in a suit by wife for judicial separation, an injunction to restrain the husband from selling certain leaseholds was refused.—*Carter v. Carter*, L.R. [1896] P. 35.
- (vi.) **P. D.**—*Nullity of Marriage—Not Consenting Party—Duress.*—Where an infant, under sudden pressure from her mother, but without the knowledge of her father, had reluctantly gone through the marriage ceremony with the respondent, under the impression that it was a betrothal only, and had never seen the respondent since she left him at the church door, it was *held*, that as she was not a consenting party, as she was under a false impression of the nature of the ceremony, and as she was under duress, the marriage was a nullity.—*Clark (falsely called Stier) v. Stier*, 73 L.T. 632.
- (vii.) **P. D.**—*Divorce Act, 1868, s. 31—Adultery of Wife—Conduct Conducting on part of Husband—Discretion of Court.*—In a suit for divorce by a husband, the jury found that he had conducted to the wife's adultery, which was admitted, by his own wilful neglect and misconduct; but the Court granted a *decree nisi* under its powers by virtue of sect. 31, with a direction that it should not be made absolute until he had secured an allowance to the wife.—*Parry v. Parry*, L.R. [1896] P. 37; 73 L.T. 759.

**Easement:—**

- (viii.) **C. A.**—*Easement—Opening of River Locks—Prescription—Lost Grant—Presumption.*—In 1689 there was granted to the corporation of Godmanchester a right for the tenant of a mill, their property, to open certain river locks now the property of the plaintiff, in times of flood; and this right had uninterruptedly been exercised. *Held*, that as to lands of the corporation that would be effected by floods they were entitled by prescription or presumption of lost grant, and that as to the mill they were entitled by the deed.—*Simpson v. Mayor of Godmanchester*, L.R. [1896] 1 Ch. 214.



**Ecclesiastical:—**

- (i.) **Consistory Court of Southwell.**—*Ecclesiastical Law—Criminal Suit to compel Lay Rector to Repair—Monition.*—On the respondent in a criminal suit for neglect to repair giving affirmative issue to the articles and submitting to judgment, he was pronounced to have offended against ecclesiastical law and was admonished to repair.—*Office of Judge promoted by Morley and Ann v. Leacroft*, L.R. [1896] P. 92.

**Extradition:—**

- (ii.) **Q. B. D.**—*Extradition Act, 1870, s. 6—Treaty between Great Britain and Belgium—British Subject Fugitive Criminal.*—A treaty between the governments of Great Britain and Belgium provides that "in no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects." *Held*, that the British Government may in its discretion surrender one of its subjects who is a fugitive criminal on a case being made out and all requirements of the Extradition Act fulfilled.—*In re Galway*, L.R. [1896] 1 Q.B. 230; 73 L.T. 756.
- (iii.) **Q. B. D.**—*Extradition Act, 1870.*—In dealing with a demand for the extradition of an accused person, the Court is not competent to enquire whether the requisition has been made in good faith by a foreign government. To extend to him the protection of sect. 3 of the Act it is not sufficient to shew that he probably may by his conduct, if he is surrendered, bring himself under penalties of a law of his native land dealing with offences other than those of a criminal nature with which he is charged.—*In re Arton*, L.R. [1896] 1 Q.B. 108; 73 L.T. 687.

**Factory:—**

- (iv.) **C. A.**—*Factory and Workshop Act, 1878, s. 9—Machinery—Child.*—The meaning of sect. 9 of the Act is that a child shall not be employed to clean any part, even a fixed part, of machinery in a factory while the machinery is in motion.—*Pearson v. The Belgian Mills Co., Limited*, L.R. [1896] 1 Q.B. 244.

**Goodwill:—**

- (v.) **H. L.**—*Sale of Goodwill—Canvassing Customers—Partnership.*—The vendor of the goodwill of a business which is sold without stipulations, may establish a competing business, but may not canvass the persons who were customers of the firm prior to the sale. The principle applies also to a retiring partner where the agreement has provided that the goodwill shall, on expiration of the partnership, become the property of the remaining partner.—*Trego v. Hunt*, L.R. A.C. 7.

**Infant:—**

- (vi.) **C. A.**—*Infant—Religious Teaching—Authority of Father.*—The misconduct of a father may deprive him of the right to the custody of his children; and where he has permitted them to be brought up in a faith different from his own, the Court will not sanction a change in their religious education, if it is of opinion that it would be to their disadvantage.—*In re Newton (Infants)*, 73 L.T. 692.
- (vii.) **Ch. D.**—*Infant—Maintenance.*—A testator directed trustees to apply in their discretion the whole or part of the income of personal property for the maintenance of the children of his sister till they attained 23 years of age, and to accumulate the residue. The capital and accumulations he gave in equal shares to such of his sister's children as reached 23, as tenants in common. His sister who survived him

had two children only, both born in his lifetime. Soon after the decease of the testator it was declared by an order that the gift of capital was void for remoteness, and the trustees accumulated the income without applying any part to the maintenance of the children. On a summons subsequently taken out by the children, one of whom had attained 23, it was held that the trust for maintenance could be severed from the gift of capital and was good; that the trustees not having exercised their discretion, had now, notwithstanding that one child was 23, a power to apply accumulations up to the date of his attaining that age to the past maintenance of the two children, and to apply to the maintenance of the younger child the accumulations till he should reach 23.—*Jackson v. Parrott*, L.R. [1896] 1 Ch. 281; 73 L.T. 743.

### Landlord and Tenant:—

- (i.) **Ch. D.**—*Residential Flat—Restrictive Covenants*.—A lady rented of the defendant a flat in a large building composed of flats for a term of three years, terminable earlier at her option. The agreement, which was on a printed form, required the observance by the tenant of a number of regulations framed for the convenience of the whole body of tenants in the building. On the defendant commencing extensive alterations to convert a great part of the building into a fashionable club, it was held, that the plaintiff was entitled to have the general character of the building preserved, and the defendant was restrained from making the alterations projected.—*Hudson v. Cripps*, L.R. [1896] 1 Ch. 265; 73 L.T. 741.

### Local Government:—

- (ii.) **Q. B. D.**—*Municipal Corporations Act, 1882—County Council—No Election—Mandamus*.—When a municipal election has not been held on the appointed day, an order for a peremptory *mandamus* on an *ex parte* application of an elector will issue under sect. 70 (1 and 2) of the Act for the election on a day appointed by the Court.—*In re County Council of West Sussex*, 73 L.T. 566.
- (iii.) **C. A.**—*Local Government Act, 1894—Women as Parochial Electors*.—Ownership of property does not qualify a woman to be a parochial elector in the parish wherein it is situate.—*Drax v. Ffooks*, L.R. [1896] 1 Q.B. 238; 74 L.T. 43.
- (iv.) **Q. B. D.**—*Public Health (London) Act, 1891, ss. 39, 41—Defective Water Closets—Validity of Notice to make Structural Alterations*.—Notwithstanding the right of appeal to the county council given by sub-sect. 3 of sect. 41 to a person aggrieved by a notice served on him by a sanitary authority, a magistrate on the hearing of a summons for non-compliance may enquire into the validity of the notice. *Held*, further, by Kennedy, J., that “alteration or amendment” in sub-sect. 2 of sect. 41 does not refer to structural alteration.—*Fulham (Vestry of) v. Solomon*, L.R. [1896] 1 Q.B. 198.
- (v.) **Q. B. D.**—*Local Government Act, 1894—Highway Authority—District Council*.—Sect. 25 of Local Government Act, 1894, transfers to district council powers and liabilities of highway authorities in district, and sect. 89 repeals so much of any local or personal Act as is inconsistent with it, and highway expenses are to be defrayed out of the rates within sect. 29.—*Marshland, Smeeth, & Fen District Commissioners v. Marshland District Council*, 73 L.T. 563.

### Lunatic:—

- (vi.) **C. A.**—*Lunacy Act, 1890—Conveyancing Act, 1881—Settled Land Act, 1882—Lunatic Tenant for Life Sale—Covenants—“Beneficial Owner.”*—A lunatic may, by his committee who is selling his estate by order of

judge in lunacy, enter, by authority of the judge, into the usual covenants, including those for title, and execute the conveyance under sect. 124 of the Lunacy Act.—*In re Ray (a person of unsound mind)*, L.R. 1 Ch. 468; 73 L.T. 728.

- (i.) **C. A.**—*Settled Land Act, 1882, ss. 6, 62—Lunacy Act, 1890, ss. 116, 120—Tenant for Life Detained as Lunatic not so Found—Person to Exercise Powers of Committee—Lease.*—The Court has, under sect. 120 of the Lunacy Act, jurisdiction to extend the powers of leasing vested by sects. 6, 62 of the Settled Land Act, 1882, in a tenant for life who is a lunatic so found by inquisition, to a person appointed under sect. 116 of the Lunacy Act to exercise the powers of a committee of the estate of a person lawfully detained as a lunatic but not so found by inquisition.—*In re Salt*, L.R. [1896] 1 Ch. 117; 73 L.T. 598.

### Partnership:—

- (ii.) **C. D.**—*Arbitration Act, 1889, s. 4—Arbitration Clause—Action for Dissolution—Motion to Stay.*—Where there is an arbitration clause in partnership articles, an arbitrator may decide for or against a dissolution, but there is power in the judge to decide on a motion to stay proceedings, whether the subjects in difference between the partners shall be determined by action or by arbitration.—*Vawdry v. Simpson*, L.R. [1896] 1 Ch. 166.

### Patent:—

- (iii.) **C. A.**—*Patents, Designs and Trade Marks Act, 1883, s. 29—O. lviii., r. 4—Judgment in Action for Infringement—Application for leave to Adduce further Evidence—Jurisdiction.*—Where in a patent case in which an injunction was granted, and notice of appeal had been given, leave was asked to amend particulars and adduce further evidence, it was held that the Court of Appeal had under the Judicature Acts and Order lviii., r. 4, power to grant the leave, and that as to the exercise of the Court's powers, a patent action was in the same position as another action.—*Shoe Machinery Co. v. Cutlan*, L.R. [1896] 1 Ch. 108.
- (iv.) **H. L.**—*Patents, Designs and Trade Marks Act, 1883—Amended Specification—"Any other Suitable Driving Motion"—Validity.*—Where there were alleged discrepancies between an original and an amended specification, and the inventor after describing a force for setting in motion machinery which he claimed to patent, had used the words or "any other suitable driving motion," it was held that an amended claim is, when admitted, a complete substitute for the original claim; and that the alternative words used did not invalidate the patent, as the motive power was not claimed as part of it. (Judgment of the Court below affirmed.)—*Marsden v. Moser*, 73 L.T. 667.

### Practice:—

- (v.) **P. D.**—*Matrimonial Causes Act, 1857, s. 32—Dissolution of Marriage—Alimony—Injunction.*—A husband, against whom a decree nisi for dissolution of marriage had been obtained, was restrained by injunction from dealing with certain property pending the execution of a deed securing alimony.—*Newton v. Newton*, L.R. [1896] P. 36.
- (vi.) **P. D.**—*Probate—Incorporation of English and Foreign Wills.*—A testator left a will dealing with property in America and a will dealing with property in England, with the intention that the American executors should transfer residue to the executors of the English will. Held, that the American will should not have been included in probate of the English will.—*In the goods of Murray*, L.R. [1896] P. 65.

- (i.) **P. D.**—*Divorce—Matrimonial Causes Act, 1857, s. 28—Rules of 1865—Corroboration of Affidavit—Leave to Proceed without Co-respondent.*—A motion for leave to proceed without making a co-respondent will, in future, probably be dismissed unless an affidavit is filed in corroboration of the affidavit of the petitioner.—*Barber v. Barber*, L.R. [1896] P. 73.
- (ii.) **C. A.**—*County Courts Act, 1888, ss. 65, 118—Costs—Taxation.*—A solicitor may recover his costs incurred in a county court without taxation, if the client is no longer entitled to taxation and has made no application for it, for sect. 118 of the Act applies only when application is made. The section does not impair the solicitor's right to recover costs incurred in an action in the High Court before the action is remitted to the county court.—*Cubison v. Mayo*, L.R. [1896] 1 Q.B. 246; 74 L.T. 65.
- (iii.) **P. D.**—*Divorce—Identification by Photograph.*—Except under very special circumstances, the Court will not, in matrimonial cases, act upon a photograph alone in a matter of identity.—*Frith v. Frith and Paice*, L.R. [1896] P. 74.
- (iv.) **H. L.**—*Special Case—Questions of Fact—Decision extra cursum curiæ.*—The judgment of a Court pronounced *extra cursum curiæ* is in the nature of an award by an arbitrator, and no appeal will lie from it. (Judgment of Court of Appeal reversed).—*Burgess v. Morton*, 73 L.T. 713.
- (v.) **C. D.**—*Trustee Relief Act—Money Paid into Court under Mistake—Supposed Intestacy—Subsequent Discovery of Will—Payment Out.*—On the supposition that a person had died intestate, money was paid into Court to the accounts of infants entitled as next-of-kin. A will was subsequently discovered by which the infants took legacies smaller in amount than the sums paid in as their shares. *Held*, that on proof that the legacies were fully secured, the money might be paid out of Court.—*In re Hood's Trusts*, L.R. [1896] 1 Ch. 270; 74 L.T. 77.
- (vi.) **C. A.**—*Shorthand Notes—Costs.*—The ordinary rule is that shorthand writer's notes of the judge's summing-up are allowed, but not notes of the evidence except for some special reason.—*Pilling v. The Joint Stock Institute, Limited*, 73 L.T. 570; but see *Andrews v. Mockford* (No. 2), 73 L.T. 730.
- (vii.) **Q. B. D.**—*Bankruptcy Act, 1883, s. 21, sub-s. 2—Trustee—Objection by Board of Trade—Costs.*—The Court, in an objection to the appointment of a trustee, will only consider the validity of the objection in point of law; but the fact that the trustee is an accounting party, and will have to audit his own account, is a valid objection. Costs will not generally be given against the trustee.—*In re Mardon*, L.R. [1896] 1 Q.B.D. 140.
- (viii.) **C. A.**—*Original Motion—Practice—Costs—Taxation.*—From a decision, carrying costs, of this Court adverse on points to each party, both parties appealed to the House of Lords, but one appeal was withdrawn. *Held*, whatever might be the ordinary practice, that as one party had thus acquiesced in the decision of this Court, taxation of such party's costs should be stayed till decision on appeal of the other party.—*Russell v. Russell*, 73 L.T. 569.
- (ix.) **C. A.**—*Mortgagees' Legal Costs Act, 1895—Appeal—Time Expired.*—Although 58 & 59 Vict., c. 25, sect. 3, is retrospective and enables a solicitor mortgagee to recover his professional charges from the mortgagor, no extension of time will be granted for appealing against decisions pronounced before the law was altered by the Act.—*Eyre v. Wynn-Mackenzie*, L.R. [1896] 1 Ch. 135; 73 L.T. 571.
- (x.) **Ch. D.**—*Insolvent in India Deceased—Fund in Court—Payment out to Official Assignee—Administration in England Waived.*—The official assignee in India in whom had been vested by an order of Court at

Bombay under 11 & 12 Vict., c. 21, all the real and personal estate present and future of a bankrupt since deceased without discharge, is entitled to have handed to him without taking out letters of administration in England, a fund paid into Court by trustees of will of bankrupt's father.—*In re Lawson's Trusts*, L.R. [1896] 1 Ch. 175; 73 L.T. 571.

- (i.) **H. L.**—O. xxxix., r. 6—*Libel—Misdirection—New Trial*.—The Court of Appeal, though of opinion that there had been misdirection in the trial of an action for libel, had refused a new trial on the ground that there were isolated imputations sufficient to sanction the verdict. *Held*, reversing the decision, that as an important point had been practically withdrawn from the consideration of the jury, it was irrelevant to consider whether the rest of the printed matter complained of would justify a verdict for the damages given.—*Bray v. Ford*, L.R. [1896] A.C. 44; 73 L.T. 609.
- (ii.) **C. A.**—*Practice—Entry in Commercial Cause List Before Appearance*.—The Court of Appeal have laid down a rule that an order may be made for the entry of a cause in the commercial list, before the defendant has entered an appearance.—*Barry v. Peruvian Corporation, Limited*, L.R. [1896] 1 Q.B. 208; 73 L.T. 678.
- (iii.) **C. A.**—*County Courts Act, 1888, s. 66—Tort—Remittal of Action from High Court—Time of Transfer of Jurisdiction*.—The jurisdiction of the High Court over an action of tort which has been remitted to the county court continues until the writ and the remittal order are lodged with the registrar of the county court.—*D'Errio v. Samuel and Another*, L.R. [1896] Q.B. 163; 73 L.T. 680.
- (iv.) **P. D.**—*Collision Action in rem—Compulsory Pilotage—Joinder of Pilot as Defendant*.—An order of the Court below that a pilot should be joined as defendant in an action *in rem* was set aside as being likely to cause embarrassment in the action.—*The Germanic*, L.R. [1896] P. 84; 73 L.T. 730.
- (v.) **H. L.**—*Arbitration Act, 1889, s. 4—"Step in the Proceedings"*.—A summons in chambers for an extension of time to deliver defence is a "step in the proceedings" within sect. 4 of the Arbitration Act, 1889, and the party taking it out is precluded from obtaining an order to stay proceedings and loses his right to have the matter in dispute determined by an arbitrator. (Judgment of the Court of Appeal affirmed.)—*Ford's Hotel Co., Limited v. Bartlett*, L.R. [1896] A.C. 1; 73 L.T. 665.
- (vi.) **Ch. D.**—*Infringement of Patent—Undertaking—Injunction Subsequently applied for*.—On a motion for an injunction to restrain the defendants from infringing a patent by selling certain goods, notwithstanding that they had written a letter stating that they had made the sales in ignorance that the goods were protected by a patent, that they would account for all profits made, would destroy the remaining stock and would undertake not further to infringe the plaintiffs' rights. *Held*, that the plaintiffs were entitled to have the undertaking given in Court, but that the Court would in its discretion refuse an injunction; that the costs of appearance and all costs up to the date of the letter must be borne by the defendants; but that the plaintiffs must pay all costs incurred between the date of the letter and the date of the appearance as they ought to have been satisfied with defendants' undertaking.—*Jenkins v. Hope*, L.R. 1 Ch. 278; 73 L.T. 705.

#### Principal and Surety:—

- (vii.) **Q. B. D.**—*Alteration in Bond—Co-Sureties—Contribution*.—A co-surety in executing, as the last signatory, a joint and several bond added words curtailing the liability which he had undertaken. *Held*, con-

firming the judgment in the county court, that this was a material alteration which discharged the other sureties, because their right to contribution from him was diminished; and which made the instrument void against himself because he had contracted on the understanding that the bond was valid against his co-sureties.—*Ellesmere Brewery Co. v. Cooper*, 73 L.T. 567.

**Provident Society :—**

- (i.) **C. D.**—*Bills of Sale Amendment Act*, 1882, s. 17.—The statutory requirements affecting bills of sale apply to debentures charging personal property as security which were issued by a society registered under the Industrial and Provident Societies Acts.—*Great Northern Railway Co. v. Coal Co-operative Society*, L.R. [1896] 1 Ch. 187.

**Railway :—**

- (ii.) **C. A.**—*Lands Clauses Act*, 1845—*Right of Pre-emption of Superfluous Lands—Compulsory powers of another Co.*—The North-Eastern Railway Co. took certain lands by compulsion from the plaintiff's predecessors in title. Before the time when the plaintiff could, under the Lands Clauses Act, have claimed right of pre-emption of superfluous lands, the Lancashire and Yorkshire Railway Co. obtained parliamentary powers to acquire compulsorily from the North-Eastern Co., but with a clause preserving all rights of the plaintiff, a portion of the land originally taken from the plaintiff's predecessors. *Held*, reversing the decision of the Court below, that sects. 127, 128, and 129 of Lands Clauses Act apply to voluntary sales, but not to compulsory purchases under an Act; that before the notices to treat had been served by the Lancashire and Yorkshire Co., the plaintiff had no rights against the North-Eastern Co.; and the North-Eastern Co. has no equity in the land after the notices had been delivered.—*Dunhill v. North-Eastern Railway Co.*, L.R. [1896] 1 Ch. 121; 73 L.T. 644.
- (iii.) **C. A.**—*Railway—Level Crossing—Contributory Negligence—Burden of Proof.*—The husband of plaintiff, while going over a level crossing at night, was killed by an engine which did not whistle, but the lamps of which might have been seen for half-a-mile. *Held*, that assuming there was negligence on the part of the company's servants, the plaintiff must be non-suited on the ground that she had not furnished evidence upon which the jury could come to a conclusion that the accident was the result of such negligence.—*Wakelin v. London and South-Western Railway Co.*, L.R. [1896] 1 Q.B. 189 (n); 73 L.T. 614 (n).
- (iv.) **C. A.**—*Level Crossing—Negligence—Contributory Negligence—Question for Jury.*—An application for a new trial on the ground that there was misdirection and that there was no evidence of negligence on the part of defendants was refused where a man had been killed at a level crossing in charge of which was a gatekeeper who had not performed his habitual duty.—*Smith v. South-Eastern Railway Company*, L.R. [1896] 1 Q.B. 178; 73 L.T. 614.
- (v.) **H. L.**—*Employers' Liability Act*, 1880, s. 1, sub-s. 5—*Negligence—Evidence—Person in Charge or Control of a Train.*—From a train, worked by a driver and a fireman in the employ of the defendants, some wagons were detached and left imperfectly scotched on an incline, down which they ran and killed another servant of the defendants, the husband of the appellant. In an action in the county court, under the Employers' Liability Act, the appellant was non-suited on the ground that there was no evidence to go to the jury that the driver or fireman was "in charge or control of the train." This decision was upheld by the Divisional Court and approved by the Court of Appeal. *Held*, reversing these judgments, that there was

evidence for the jury that what was done was negligently done; that those have control of a train who can make it move, or stay its moving, or have charge in any particular department necessary to its proper conduct; that the driver did not cease to be in charge when he had uncoupled his engine; and that the fireman, whose duty was to scotch a portion detached, was equally in charge.—*McCord v. Charles Cammell & Co., Limited*, L.R. [1896] A.C. 57; 53 L.T. 684.

### Revenue:—

- (i.) **H. L.**—*Income Tax—Company Registered in United Kingdom Carrying on Business Abroad—Profits*—5 and 6 Vict., c. 100, Sched. D., Cases 1 and 5.—A company with business carried on outside the United Kingdom, but directed by a Board from offices registered in the United Kingdom, is chargeable for income tax on whole of profits under first case of Schedule D., 5 and 6 Vict., c. 35.—*San Paulo (Brazilian) Railway Co. v. Carter*, L.R. [1896] A.C. 31; 73 L.T. 538.
- (ii.) **Q. B. D.**—*Income Tax Act, 1842, s. 100, Sched. D., Cases 1, 4, 5—English Company with Branches Abroad—Profits made and Retained Abroad—Interest on Foreign Investments.*—Where an insurance company, whose head office was in England, had, in order to found a reserve fund, which the law of the United States required to be established, authorised the retention and investment of profits made by its American branch, it was held, that both the fund invested and the interest received upon the investment were liable to be assessed as profits, notwithstanding that they had not been transmitted to this country.—*Norwich Union Fire Insurance Company v. Magee (Surveyor of Taxes)*, 73 L.T. 733.
- (iii.) **Q. B. D.**—*Probate Duty—"Documents of Title" of Foreign Railway.*—"Documents of title" to shares in American railways, which by delivery entitle the transferee to all the transferor's rights and are marketable in England, are liable to probate duty as documents of value in the hands of executors.—*Stern and Others v. Reg.*, L.R. [1896] 1 Q.B. 211; 73 L.T. 752.
- (iv.) **Q. B. D.**—*Stamp Act, 1891, s. 32—Order for Transfer of Private Money to Public Revenue—Stamp Duty—Exemption, No. 10.*—An order for the transfer from a private customer's account at the Bank of England to an account of public revenue at the same bank must bear a penny stamp. Exemption 10 in the Act applies only to what is already public money.—*Committee of London Clearing Bankers v. Commissioners of Inland Revenue*, L.R. [1896] 1 Q.B. 222; 74 L.T. 55.
- (v.) **Q. B. D.**—*Customs and Inland Revenue Act, 1878, s. 13.—House Duty—House "Divided into and Let on Different Tenements."*—Where a lessee separated from the upper part of a house by means of bolts or screws on the communicating doors, the lower part which he himself occupied as a shop for business purposes, it was held, that he did not come within the exemption in sect. 13 of the Act, and was liable to inhabited house duty for the entire building.—*Hoddinott (Surveyor of Taxes) v. The Home and Colonial Stores, Limited*, L.R. [1896] 1 Q.B. 169; 74 L.T. 79.

### Settled Land:—

- (vi.) **C. D.**—*Appointment—Failure of—Contingent Remainder—Life Estate.*—In accordance with powers in a marriage settlement, lands were appointed to the use as tenants in common of all the grandchildren of the marriage who, at the decease of the survivor of the husband and wife, the life tenants, should be living, and to the heirs and assigns of such of them as should attain the age of 25 years; but in case any such child should die under 25, then to the use of the survivors and their

heirs and assigns. *Held*, that all the grandchildren who were living at the death of the surviving grandparent, took an immediate life interest as tenants in common, and that the remainder in fee in common vested in those grandchildren who at that time were 25 years of age, the contingent remainder having failed as regards those who were younger when the prior life estate came to an end.—*Symes v. Symes*, L.R. [1896] 1 Ch. 272; 73 L.T. 684.

- (i.) **C. A.**—*Tenant for Life—Parent and Child—Charge—Payment of—Raised out of Estate.*—The relationship of parent and child between life tenant and remaindermen does not of itself rebut legal presumption that an incumbrance paid off by tenant for life is for his own benefit, and imports right to have charge raised out of estate. (Judgment of Court below reversed.)—*Harvey v. Hobday*; *in re Harvey*, L.R. [1896] 1 Ch. 187; 73 L.T. 613.

### Sea Fisheries:—

- (ii.) **Q. B. D.**—*Sea Fisheries Regulation Act, 1888, s. 6.*—After the appointment of an officer under sect. 6, "restrictions or conditions as to expenditure" in connection with his appointment cannot be applied.—*Reg. v. Plymouth (Mayor of)*, L.R. [1896] 1 Q.B. 156.

### Settlement:—

- (iii.) **Ch. D.**—*Conveyancing Act, 1881, s. 52—Release of Power for Releasor's Benefit—Validity.*—Under a settlement a parent had a life interest in, and a power of appointment over, property to which in default of appointment his daughter became absolutely entitled. He released the power, and with his daughter mortgaged the property. Subsequently he became bankrupt, and the property was sold. On the question whether the trustee could distribute the proceeds, it was *held*, that the doctrine applying to the exercise did not apply to the release of a power of appointment, and that the release was valid, though for the releasor's benefit.—*Smith v. Somes*; *in re Somes*, L.R. [1896] 1 Ch. 250; 74 L.T. 49.

### Ship:—

- (iv.) **Commercial Court.**—*Marine Insurance—Damage to Goods—Total or Partial Loss—Costs of Conditioning.*—A policy of marine insurance covered a load of rice valued at £450 in a barge which was sunk by collision but was subsequently floated. The damaged rice, for which an offer of £50 in its wet state was refused, was kiln-dried at a cost of £68 and was sold for £111. *Held*, that as the rice was capable of being conditioned, the loss was partial only, and that as the cost of conditioning fell on the underwriters, the loss was to be calculated on the difference between the sound value and the sum realised.—*Francis v. Boulton*, 73 L.T. 578.
- (v.) **C. A.**—*Removal of Wreck from Tidal River—Expenses—Owner—Harbours, Docks, and Piers Clauses Act, 1847—Aire and Calder Navigation Act, 1889.*—The registered owner of vessel sunk in tidal waters is not liable for costs of removal incurred after he has given formal notice of abandonment of ownership. (Judgment of Mathew, J., confirmed.)—*Barracough and Others v. Brown and Others*, 73 L.T. 620; 74 L.T. 86.
- (vi.) **Q. B. D.**—*Marine Insurance—Partial Loss where Owners Insurers—Subsequent Total Loss Under Risks of Policy.*—Where a ship, insured against loss by fire or explosion only, was stranded and subsequently destroyed by fire, it was *held* that though the vessel might be worth less at time of loss than agreed value of policy, yet the valuation determined the amount of indemnity.—*Woodside & Co. v. Globe Marine Insurance Co., Limited*, L.R. [1896] 1 Q.B. 105; 73 L.T. 626.



- (i.) **Q. B. D.—Marine Insurance—Policies Issued by Syndicate—Whether Joint or Several Liability.**—A claim having arisen under a policy issued by a syndicate formed under an agreement which provided that the manager should underwrite for, sign the name of, and affix in every policy the risk taken by each member; that he should be paid by a percentage of profits and charge certain expenses to the syndicate; that he should re-insure all total losses; and that no liability should attach to any member beyond his own proportion of the risk accepted in his name. *Held*, that the liability of the members was several and not joint.—*Tyser and Others v. The Shipowners' Syndicate (re-assured) and Others*, L.R. [1896] 1 Q.B. 135; 73 L.T. 605.
- (ii.) **C. A.—Marine Insurance—"Profit on Charter"—Material Facts—Destruction of Merchantable Character of Goods—Total Loss.**—A policy of insurance "on profit on charter" with warranty against all average, was effected by the charterers of a ship without stating to the underwriters that the charter was for a lump sum. On the voyage the ship was submerged, and the greater part of the cargo, though still of considerable value, was deprived of its merchantable character, and the freight upon it was therefore not earned. *Held*, affirming the judgment of Mathew, J., that the subject matter of the policy was the excess of the bills of lading freight over the charter freight; that there had been a total loss under the terms of the policy as the charter freight was greater than the freight received; and that the non-statement that it was a lump sum charter was not a concealment of a material fact.—*Asfar & Co. v. Blundell & Others*, L.R. [1896] 1 Q.B. 123; 73 L.T. 648.
- (iii.) **C. A.—Merchant Shipping Act, 1854, ss. 2, 458, 746—County Courts Admiralty Jurisdiction Act, 1868, s. 3—Gas Float—Salvage—Jurisdiction.**—A salvage claim in respect of a gas float could not be maintained in the High Court of Admiralty, and is, therefore, beyond the jurisdiction of a county court under sect. 3 of the Act of 1868.—*The Gas Float Whitton (No. 2)*, L.R. [1896] P. 42.
- (iv.) **H. L.—Bill of Lading—Goods Delivered Short—Proof.**—A bill of lading, duly signed by the master of the ship, binds the shipowner to deliver all the goods signed for, or to produce proof that the part from which he claims to be relieved, was not actually shipped.—*Smith & Co. v. Bedouin Steam Navigation Co.*, L.R. [1896] A.C. 70.

#### Solicitor:—

- (v.) **P. D.—Solicitors' Act, 1860, s. 28—Solicitors' Lien—Notice—Assignment—Charging Order.**—Where a plaintiff in an action was a debtor of the defendant's solicitors, and authorised them to retain a sum to be paid by their client under terms of a compromise, it was *held* that this was not an assignment within sect. 28 of the Act to deprive the solicitors of the plaintiff of a right to a charging order, and that notice of their lien was given to the opposing solicitors by the action itself.—*The Paris*, L.R. [1896] P. 77; 73 L.T. 736.

#### Trade Protection Society:—

- (vi.) **C. A.—Voluntary Society—Resignation of Membership—Revocation—Effect.**—A member of a voluntary trade protection society, who is under no other obligation to the body than to pay his subscription, may resign at his pleasure, but the revocation of his withdrawal will not reconstitute him a member.—*Finch v. Oake*, L.R. 1 Ch. 409; 73 L.T. 716.

#### Trustee:—

- (vii.) **C. D.—Trustee Act, 1893—Substituted Trustee—Person to Appoint—Under Settlement—Under Act.**—Where a husband had, under a marriage settlement, power to appoint a new trustee in place of an existing one who had become subject to certain specified disabilities, in which

bankruptcy was not included, *held*, that the Trustee Act, sect. 10, did not extend this power to the husband where the disqualification of the trustee whom it was desired to displace was bankruptcy, but that the power must be exercised by the person appointed by the legislature. —*In re Wheeler and De Rochow's Trusts*, L.R. [1896] 1 Ch. 315; 73 L.T. 661.

- (i.) **Ch. D.**—*Trustee Executor Abroad*—Appointment by Tenant for Life of own Solicitor as New Trustee.—*Settled Land Act*, 1882.—A trustee who has taken up his residence for a fixed period abroad may, even though he is also executor, if the personal estate is exhausted, be removed under a power in the settlement; and sect. 38 of *Settled Land Act*, 1882, does not prevent a tenant for life from *bonâ fide* appointing his own solicitor to fill the vacancy. —*In re Earl of Stamford*; *Payne v. Stamford*, L.R. [1896] 1 Ch. 288; 73 L.T. 559.
- (ii.) **C. A.**—*Breach of Trust*—*Improper Investments*—*Constructive Trustee—Solicitor and Partner*.—A husband and wife, under powers of a marriage settlement, appointed a new trustee in place of a retiring one; and with their approval, with the approval of the new trustee and with the knowledge of his only co-trustee, there was invested by a member of a firm of solicitors, on leasehold property within the terms of the settlement, the greater portion of the trust funds. Cheques were drawn by the two trustees in favour of the solicitor to meet these investments from time to time. The security was insufficient and a large part of the fund was lost. The Statute of Limitations protected the solicitor from liability professionally, and it was sought to make him and his partner liable as constructive trustees. *Held*, reversing the decision of the Court below, that as one defendant had acted in all that he did as solicitor to one of the trustees with the sanction of the other, and as the investments were within the terms of the settlement, he could not be made a constructive trustee; and that with regard to the other defendant, it is not within the scope of a solicitor's business for one member of a firm to constitute himself a constructive trustee so as to bind his partner.—*Mara v. Browne*, L.R. [1896] 1 Ch. 199; 73 L.T. 638.
- (iii.) **C. D.**—*Trustee Act*, 1893—*Amendment Act*, 1894—*Improper Investment—Loss of Trust Fund—Liability—Question of Retrospective Effect of Act*.—Sect. 4 of the Amendment Act of 1894 is not retrospective in its effect, and where losses had, prior to the date of the Act, fallen upon trust funds through the trustees of a will having allowed mortgages to continue, the trustees were held jointly and severally liable to make good the deficiency.—*In re Chapman*; *Cocks v. Chapman*, L.R. [1896] 1 Ch. 323; 73 L.T. 658.
- (iv.) **C. A.**—*Trustee abroad—Disclaimer as to property within Jurisdiction*.—A trustee of an estate, comprising property in England and abroad, renounced office as to real and personal estate "without the bounds of the United States of America." *Held*, that it is not competent to a person to disclaim partially the office of trustee or executor, or to renounce authority over part only of the trust property.—*In re Lord and Fullerton's Contract*, L.R. [1896] 1 Ch. 228; 73 L.T. 689.

### Vendor and Purchaser:—

- (v.) **C. A.**—*Settled Land Act*, 1882, ss. 5, 30—*Improvement of Land Act*, 1864, ss. 15, 68, 69—*Release of Rent Charge—Exoneration of Part of Land—Consent of Incumbrancer*.—Where, out of land subject to an improvement rent-charge, a portion was agreed to be sold free from incumbrance, *held*, reversing the decision of the Court below, that a deed of exoneration executed by the vendor and the incumbrancer gave, without a release from the Board of Agriculture, a good and clear title to the lands agreed to be sold, perfectly discharged from the incumbrance

and from contribution under the Tithe Act, 1842.—*In re The Earl of Stafford and Maples*, L.R. [1896] 1 Ch. 235; 73 L.T. 596.

- (i.) **Ch. D.**—*Settled Land Act, 1882—Conveyancing Act, 1881—Married Woman Restrained from Anticipation—Tenant for Life.*—A married woman entitled to an equitable estate in fee for her separate use with restraint on anticipation, there being issue born capable of inheriting, has not the powers of a tenant for life under the Settled Land Act, 1882, for though her husband would on survival, if she made no disposition by will, be entitled as tenant by the courtesy, he would succeed by operation of the general law. But to effect a sale of the freehold for her benefit, the restraint may be removed by order or judgment of the Court under sect. 89 of the Conveyancing Act, 1881.—*Bates v. Kesterton*, L.R. [1896] 1 Ch. 159; 73 L.T. 656.
- (ii.) **Ch. D.**—*Settled Land Act, 1882—Appointment under a Power—Whether Settlement within Act.*—Under a will, made in exercise of a power of appointment, real estate was limited to trustees in trust for a married woman for life without power of anticipation, with remainder to such of her children or remoter issue as she should by will appoint, and in default to herself in fee. On a contract to sell the realty, the title was objected to on the ground that the appointment was not a settlement as defined by the Settled Land Act. *Held*, that under sect. 58, sub-s. 1 ix., and 2, of the Act, the married woman could make a good title as tenant for life.—*Pocock and Prankerd and the Governors of Wisbeach Grammar School*, L.R. 1 Ch. 302; 73 L.T. 706.

#### Will :—

- (iii.) **Ch. D.**—*Will—Construction—Trust for Sale with Power to Postpone—Going Concern, with Power to Carry on.*—Where the business of a pawn-broker was given to trustees to sell as a going concern, with power to postpone the sale for as long as they should think fit, it was *held*, that they might carry the business on for two years to enable the sons, one of whom was a minor, to purchase it.—*Arnold v. Smith; in re Smith*, L.R. [1896] 1 Ch. 171; 74 L.T. 14.
- (iv.) **Ch. D.**—*Will—Construction—Gift to Charities Carrying Realty and Impure Personality.*—A testator who died in 1888 left pure and impure personality and realty on trust, with directions to the trustees to sell and convert and to pay one-tenth of his estate over and above £110,000 to such charitable institutions as they might determine. *Held*, that the gift to the charities comprised realty and impure personality, and that there was a gift of one-tenth of the whole distributable estate beyond £110,000, not a gift of one-tenth of the value of the estate beyond £110,000 at the period of one year from the testator's death. Directions were given to the trustees to submit a list of the charities selected and the amounts proposed to be given to each.—*Whitwham v. Percy; in re Percy*, 73 L.T. 732.
- (v.) **C. A.**—*Will—Accumulation—Equal Division—Option to take Business at Valuation—Advancement out of Residue—Question of Interest.*—A testator left the residue of his property to his children in equal shares, the fund to be accumulated till the youngest child attained twenty-one, and then to be distributed. But to one son was given the option, which he exercised, of succeeding to his father's business, being "debited with the value thereof," and another son availed himself of an advancement which was "to be taken as part satisfaction of his share." *Held*, confirming the judgment of Kekewich, J., that the son who took the business was not liable for interest on the amount of the valuation; and that (*dissentiente*, Rigby, L.J.) the son who had advancement was not liable for interest on the amount advanced out of the residuary fund.—*Dallmeyer v. Dallmeyer*, L.R. [1896] 1 Ch. 272; 73 L.T. 671.

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# THE LAW MAGAZINE AND REVIEW.

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No. CCCI.—AUGUST, 1896.

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## Obiter Dicta.

THE Judges of the Supreme Court have drafted a proposed Order in Council for the purpose of concentrating Civil business on the Midland and Western Circuits. Questions have been asked in Parliament on the subject, and some agitation prevails among the barristers of those Circuits. The truth is, the Judges are well aware that the Circuits are rapidly decaying, and decline to waste Judicial strength without commensurate advantage.

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The Trial at Bar of *Reg. v. Jameson and Others* began on July 20th, and probably will have terminated by the time these lines are in print. The indictment contained 12 counts, all framed upon s. 11 of the Foreign Enlistment Act, 1870. The main defence raised by Sir Edward Clarke, on behalf of the defendants, was that there was no evidence that the Foreign Enlistment Act, 1870, was in operation in 1895—the time of the expedition—at Mafeking or Pitsani Pitlogo, or that those places were within the dominions of the Crown. He drew attention to the fact that the Act, 28 and 29 Vict., cap. 83, by sect. 2, forbids a Colonial Law, to be repugnant to an Imperial Act relating to a Colony; that the Legislature of the Cape had declared the Laws of the Cape (which had admitted the Foreign Enlistment Act) to be the Laws of Bechuanaland; that this was repugnant to the Foreign Enlistment Act,

sect. 3 of which Act decrees that the Law of foreign enlistment can only be applied to a Colony when proclaimed there under that section. The Judges, Lord Russell of Killowen, C.J., Mr. Baron Pollock, and Mr. Justice Hawkins, decided against the above objection. The whole defence therefore was narrowed to mere questions of fact.

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It is much to be regretted that the very important point of Law was not raised, viz., that the whole Foreign Enlistment Act only applies to the regulation of the conduct of Her Majesty's subjects *during the existence of hostilities between foreign States*, with which Her Majesty is at peace. No foreign States were at war. *Cadit questio.*

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The Paris *Soleil*, of July 10th, published an article directed against the supremacy of Great Britain. The Journal points out that England is at the height of her commercial prosperity, that the value of her maritime trade surpasses that of all the other nations of the world together, and finally, that all other nations are tributary to England for international telegraphic communications. The Journal therefore recommends the re-establishment of the system of privateering in time of war, as carried on in the old days by Jean Bart and Surcouf, but adapted to modern requirements; that is to say, by means of cruisers and fast ships, regularly commissioned, which would shun an encounter with a man-of-war and only prey upon merchant vessels. "Great Britain," concludes the *Soleil*, "would have more consideration for us and would be more disposed to grant us concessions if she knew that we were equipped for privateering, and that we did not regard ourselves as bound by the Declaration of 1856 abolishing privateering."

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The Supreme Court of Illinois, in *Chicago and Alton Railway Company v. Mulford* (May 12th), decided that a

railroad company selling a passenger a ticket, with coupons attached, over its own and connecting lines, in the absence of a contract to the contrary, acts merely as the agent of the other lines, and that there is no extra terminal liability; the rights of the passenger, and the duties and responsibilities of the several companies over whose road he is entitled to travel, being the same as if he had purchased a ticket at the office of each company constituting the through line. The contrary doctrine is held by the English courts.

It would seem that if a railroad company, issuing tickets with coupons over its own and connecting lines, is not liable for the failure of any of the connecting lines to carry the passenger, it should not be liable to answer in damages to the passenger for the loss of his luggage upon a connecting line, carried under a check issued upon the presentation of the railway ticket. Should not the luggage and the passenger be carried on similar terms?

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*The Albany Law Times*, referring to the recent transfer of land at Chicago under the Torrens system, compares the old and the new way. Under the former mode there would have been a charge of 25 to 100 dollars for examination of title, lawyers' fees to pay, a risk of flaw in the title, would also have existed, and to guard against this, many purchasers would have had the title guaranteed by a company which insures against such risks. Under the Torrens plan, the purchaser paid 3 dollars to the county treasurer for having the transfer entered on the books, and the State guaranteed the title. The previous outlay on the part of the seller was 15 dollars for examination of title, 6 dollars for the indemnity fund held by the State, and 2 dollars for the certificate.

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The Association for the Suppression of Street Noises (the Secretary being Mr. C. Fox, of 104, Ritherdon Road,



Balham, S.W.), encouraged in their work by the Report recently adopted by the London County Council, has resolved to ask the Home Secretary to receive a deputation to urge the Government to propose legislation in the next Session. They also propose to send a deputation to Sir E. Bradford, the Commissioner of Police, to urge upon him to use the powers conferred upon him under the Police Act. The Association calls attention to the words of the *Lancet*: "If only a Government would arise and say 'No great measures will be undertaken, but we will devote ourselves to making existence more comfortable,' people would arise and bless it. There is an opportunity now for our rulers to earn everlasting gratitude by bringing in and passing a Streets Bill. There is Mr. Jacoby's admirable Street Noises Bill, a birth-strangled babe for this Session, we fear, which would make a foundation."

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The endeavours of this Association, however, should not be limited to the prevention of noises in streets alone. Many of the most offensive noises, and of those most prejudicial to health, come from private properties. The barking dog, the crowing cock, the music master's rehearsal during midnight hours, the ringing bell for workmen in the early hours of the morn, and last, but not least, the use of the steam crane—a demon of the last ten years—working day and night, are all pests which the legislature ought to abolish in populous neighbourhoods.

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For example, at this very moment, the inhabitants of some of the best roads in St. John's Wood and Hampstead are being plagued night and day by the whirl and buzz of the numerous steam cranes employed by a set of speculators, the Manchester, Sheffield, and Lincolnshire Railway Co. The working of steam cranes by night should be absolutely prohibited, and should be made a criminal offence.

## I.—THE GERMAN CODE OF CIVIL PROCEDURE.

### I.—*Historical and Preliminary.*

IT has been said that the Laws of civil procedure are, above all others, those which reflect a people's character and genius with the greatest fidelity. Domat remarked that these Laws are essentially arbitrary; they vary according to times, places, and countries. But though there are striking differences between the procedure Laws of the different countries of Europe, they yet are all derived from common sources. The divergencies have been brought about by the formation of nationalities and varying national characteristics.

The most ancient source of German judicial organisation and civil procedure is the Salic Law. This was gradually succeeded by the feudal procedure, which itself underwent many changes between the 15th and 18th centuries. The Salic procedure has some striking analogies with the primitive procedure of the Roman Law. The procedure of the Salic law, like that of the *legis actiones*, is before all the work of the private party, rather than that of the public power; the injured party prosecutes and by himself obtains reparation for the wrong which he has suffered. He must, however, observe numerous solemnities, the whole procedure consisting of complicated formalities, from which it was to be freed only by degrees and after the lapse of several centuries.

The procedure was public and oral. The oath of either party had to be confirmed by that of *conjuratores*, whose number varied according to the position of the parties. An edict of Childebert of the year 550 speaks of the oath as an innovation due to Christianity. The oath succeeded the judicial combat, but the latter continued to be resorted

to sometimes when the parties had taken conflicting oaths; apart from the oaths, documents and witnesses were also ordinary means of proof. Minors, serfs, and convicted persons were incapable of testifying, while vassals could not depose against their lords. The exclusion of women was due to the rule that every witness must be in the full enjoyment of civil rights. These witnesses must not be confounded with the *conjuratores*. The witnesses deposed concerning facts of which they had a personal knowledge, while the *conjuratores* affirmed on oath according to their impression (*de credulitate*), and without knowing the facts themselves.

The feudal procedure remained intact for a long time in England, while in France it was rapidly altered under the double influence of the Canon Law and the royal authority. In Germany, too, it underwent changes, but more slowly, and rather as a consequence of the scientific movement of the Universities. In the feudal procedure formality is less absolute than in the Frank procedure, but is still very marked, and this formality lasts up to the 15th century. The procedure is still entirely oral, and the Mirror of Saxony\* recognises the right of the defendant to make his defence in his native language. The character of the oath changes, and in the *Reichstag Landrecht*† it appears as a means of actual proof. Written proof comes to be viewed with more favour than proof by witnesses, and the Mirror of Suabia decides in formal terms that the former is stronger than the latter. When two documents are contradictory, a Constitution of Otho I., and another of Otho II. direct that preference should be given to the older. At this epoch proof by witnesses is called *getüge*, and the witnesses *die gewissen*. Witnesses are still distinguished from the *conjuratores*. When the latter appear, the party first takes the oath and then the *conjuratores* swear in their

\* Mirror of Saxony, III., 71, s. 1.

† Chap. 13, s. 5.

turn that the oath of the party is in accord with the truth. Ordinary witnesses, on the other hand, first give their depositions on oath and then the party takes an oath, by which he declares that what the witnesses have said in his favour is true. The witnesses do not affirm the sincerity of the oath taken by the party, but the truth of the claim itself. As a general rule, only men of well-known probity, in enjoyment of full civil rights, and of sane mind, could be witnesses. At first the judge was bound by the depositions of the witnesses, but gradually the rôle of judge acquired more and more importance, until he was permitted to draw his own conclusions in accordance with the evidence. The Mirrors of Saxony and Suabia do not give the parties the right to attack the decision by way of appeal, but they recognize the right of a majority of the Court (whether judges or assessors) to do so. The President cannot appeal, but he can refuse to confirm the decision, and can order a re-hearing. The Mirrors, however, give the parties the right of complaining in three cases: where there has been a denial of justice; where the decision has been unjustly given; and where a party has suffered any undeserved wrong by the act of the judge. The party affected can go before the superior Court, not by way of appeal, but by way of complaint (*querela*, *Beschwerde*). If he fails, he has to bear the costs and also to pay a fine to the President and another to the members of the Court.

The system of justice before assessors began to disappear in the 16th century. The assessors had to consult lawyers, who gradually took the place of those who consulted them. The lawyers, who admired the Roman Law and Canon Law, attacked the ancient judicial forms of the laïc Courts. The procedure of the Canon Law crept in in proportion as the influence of jurists increased. The procedure ceased to be oral, and became written and secret. Proof was no longer considered as a right, but as an erroneous obligation. The

statements of parties were recorded in writing in a judicial register. The ancient oral and formal procedure of the middle ages was, however, maintained up to the 18th century in the lowest Courts, and notably in the village tribunals in purely rural causes.

In the 18th century, however, a strong reaction set in in favour of ancient Germanic usage. Roman Law had permeated the practice of the Courts owing to the united efforts of the Church, the Emperors, and the lawyers, and for a time, it may be added, of the Universities, which taught the Roman Law as the Law of the Empire. But the Roman Law and Canonical procedure obtained less favour with the mass of the people. The people, habituated to simple Laws in conformity with their customs, and to a procedure which, though formal, was oral and easy to understand, complained of the introduction of these foreign Laws, which lent themselves to interminable controversies, and introduced in the Courts the use of the Latin language, which the common people did not understand. Towards the close of the 18th century, their opposition became formidable, for it gained the Universities to its side. The teaching of Roman Law having been developed and perfected, the study of it began to be essentially critical, and it came to be recognized that, in spite of its superiority and admirable scientific form, it had its defects, and was especially calculated to give rise to embarrassments among a people for whom it had not been made. At the same time, the development of German Law regained its scope and full play at the hands of the jurists of the 18th century, and later under the influence of statesmen. The German Common Law is the creation of jurists, while statesmen have laboured, and are still labouring, for its codification. The German Common Law is entirely the work of men of science, and is composed of rules borrowed from ancient German customs, from compilations such as the

*Sachsenspiegel*, the *Swabenspiegel* and the *Kaiserrecht*, from the statutes of towns, the Canon Law, the Roman Law, the General Laws of the Empire, and finally the Special Laws of each State. It is by drawing from these numerous sources, and even by consulting the primitive Laws of nations which have a common origin with the Germanic race, that learned jurists have composed the German Common Law. The work of codification, which began in France, extended its influence to Germany; and in the field of procedure, as in almost all other branches of the Law, the codification school has won a signal triumph.

Before the passing of the New Code, the German civil procedure was as vague and varied as the German Civil Law. The absence of any written Law had led to great divergencies in different States, and caused extreme inconvenience. In the 18th and 19th centuries, some of the States codified their procedure, and though this led to greater certainty in the States concerned, it did not lessen the general diversity of judicial practice. The Prussian provinces on the right bank of the Rhine were ruled by a Law passed in 1795 under the title of *Allgemeine Gerichtsordnung*, which was subsequently modified from time to time. Bavaria had since 1753 a judicial Code (*Codex Maximilianeus Bavaricus judicarius*), modified in 1817 and 1837, and a procedure Code of quite recent date, passed in 1869 under the title of *Bayerische Civilprozessordnung*. Hanover also had an important procedure Code, passed in 1850, and revised in 1859. The systems of judicial practice in force in different parts of Germany before the passing of the new Code may be comprised in three main groups:—

1. The system of German common civil procedure (*Allgemeiner deutscher Civilprocess*), followed in the countries which had no special Law;

2. The system of the French Code of civil procedure, which flourished in the Rhine Provinces and Alsace Lorraine ;
3. The system of the Hanoverian Code of 1850, to which were allied the Wurtemberg Law of 1868, the Bavarian Law of 1864, the Oldenburg Law of 1857, and the project of the Northern Confederation of 1870. Thus the framers of the new Procedure Code had these different systems to choose from.

A project for a Code of Civil Procedure was first prepared in 1870. In 1871 a new Commission, composed of ten jurists, was charged by the Federal Council with the duty of preparing a project for the whole Empire. The work of the Commission, under the presidency of M. Léonhardt, Minister of Justice for Prussia, was finished in March, 1872. The project was then submitted to the Federal Council, and the result of the discussions that ensued was that a revised project was published in 1874. This was submitted to the Reichstag, was passed by it on the 16th December, 1876, and promulgated as the Law of the Empire on the 30th January, 1877.

## II.—*Arrangement and Contents of the Code.*

The Code consists of 872 Articles in ten Books, of which the most important are sub-divided into Sections and Titles.

The *First Book* contains "*General Provisions*," and deals with the Courts and their competence, the parties, and the forms of procedure (Arts. 1—229). The new Code decides (Art. 119) that the trial is *oral*, and that, therefore, the Judge can and must decide only on the matter and arguments put forward *viva voce* at the hearing. The preparatory pleadings (*vorbereitende Schriftsätze*), which the Code authorises without specifying their exact import,

only serve to prepare the trial, but cannot be substituted for the oral hearing.

The *Second Book* deals with "*The Procedure in Courts of first instance*," that is, the Courts of the Bailiwick (*Amtsgerichte*) and the District Courts (*Landgerichte*).

The *Third Book* (472—540) has for its subject the various "*Remedies*" (*Rechtsmittel*) against decisions. An appeal (*Berufung*) is allowed on the merits against all decisions of first instance. *Revision* is analogous to the French *pourvoi en cassation*, and is allowed against the appellate judgments of the Superior Courts in cases where the claim is indeterminate, or exceeds the value of 1,500 marks, but only on the ground of some violation or misapplication of a Law applicable to the whole Empire, or to an area larger than the jurisdiction of the Court of Appeal. There is also a special kind of motion (*Beschwerde*) to the Court immediately superior, allowed, as a general rule, only against orders which have rejected applications in matters of procedure.

The *Fourth Book* (541—554) deals with applications for re-trial or re-hearing (*Wiederaufnahme des Verfahrens*) on certain specified grounds.

The *Fifth, Sixth, and Seventh Books* treat of the special procedure in certain special matters, namely, negotiable instruments, matrimonial causes, and certain summary claims (*mahnverfahren*) (Arts. 555—643).

The *Eighth Book* regulates the *Execution of Decrees*. Decrees are executed in the Village Courts, which are for this reason called the Courts of Execution (*Vollstreckungsgericht*).

Unlike the preceding Books the *Ninth and Tenth Books* do not deal with disputes which have actually come before the Courts. The *Ninth Book* prescribes a special procedure by way of challenge (*Aufgebotsverfahren*) for those cases in which a person with a legitimate interest wishes to protect or screen himself from claims which he fears may be made by some unknown and indeterminate opponent. It is



specially resorted to in the case of the loss of negotiable instruments endorsed in blank or to bearer.

The *Tenth* and last Book (851—872) deals with arbitration.

### III.—*Some Noticeable Provisions.*

The various grades of Courts and their competence are determined by the Law of Judicial Organisation of the 27th January, 1877. It may be stated here that the Courts of first instance are presided over by a single Judge in civil cases, and the same Judge sits with two assessors for the decision of criminal cases. The District Courts are composed of three Judges for civil, and of five Judges for criminal cases. The Courts of Assize are composed of three Judges and twelve jurors. The superior District Courts always sit with five Judges. The Tribunal of the Empire sits with seven Judges. A Public Pleader or Prosecutor is attached to each Court.

*Jurisdiction.*—Suits relating to real rights or immovable property *must* be brought in the Court, within the jurisdiction of which the property is situate.\*

*Disqualification of Judges.*—The exercise of judicial functions is absolutely forbidden if the Judge is interested in the cause, or related to either party in a direct line, or in a collateral line up to the third degree, or connected by marriage up to the second degree; or if he has been examined as a witness or expert in the case; or if at some preceding stage, or in arbitration, he has concurred in the decision attacked otherwise than as Judge. A Judge may also be challenged on the ground of the existence of reasons which throw doubt on his impartiality. There is an excellent rule (Art. 43) that a party may not challenge a

\* This seems to be an almost universal rule. See Art. 59 of the French Code, 46 of Belgian Code, and 93 of Italian Code.

Judge at a later stage, if he could have done so, but has failed to do so at an earlier stage.\*

*Appearance in Person or by Counsel.*—In the Courts of first instance the parties may appear in person; but in the District Courts and Superior Courts they must be represented by an advocate. The Judges in England would probably welcome such a rule.

Art. 97 enacts that the clerks of Courts, as well as legal agents and advocates, and even bailiffs, may be condemned by the Court to pay any costs which have been occasioned by any gross negligence on their part.†

*Suing in formâ pauperis.*—Permission is not accorded to sue *in formâ pauperis*, unless it appears that there is an absence of malice and a reasonable hope of success. Foreigners can only claim the privilege if Germans can claim it in the foreign country in question (Art. 106).

*Procedure when the same issues are pending before different Courts or authorities.*—When the decision of a suit depends in whole or in part on the affirmative or negative solution of an issue actually pending before, or which ought to be decided by, some administrative authority, the Court may order the postponement of the trial until such issue has been decided by the administrative authority. Again, when on the course of a trial, it appears that some criminal offence has been committed, the proof of which should influence the decision, the Court may direct the postponement of the trial until the matter has been decided in a Criminal Court (Arts. 139, 140). It seems a pity there are

\* It is much to be regretted that there is not a similar provision in the Indian Codes. In India it is a very common thing for a party, who thinks a magistrate has formed an opinion adverse to his case, to make an application for a transfer of the case to another Court. A magistrate cannot draw up a charge unless and until he considers that a *prima facie* case has been made out and it is after the charge is framed that such *mala fide* applications are frequently made and supported by lying affidavits.

† There is an analogous provision in the French Code, Art. 132.

not similar rules in India. The Civil Judges in India admit that perjury and forgery are committed in almost every suit, and prosecutions for forgery at any rate should certainly be instituted whenever there is a reasonable hope of securing a conviction. But the Civil Courts rarely send such matters to the magistrate; and when an offence of this kind has been committed before a particular Court, the magistrate cannot take cognizance of it without the sanction of such Court. Again, the High Courts in India would contemplate, with jealousy and horror, the very idea of subordinating any civil litigation to the decision of any analogous, or connected, issue before a Revenue Court or administrative authority, although such Court or authority might be in a far better position to decide such issue.

*Rules to Prevent Waste of the Public Time.*—The Court may forbid the continuance of discussion by any party or agent, who has not the requisite capacity for laying the matter clearly before the Court; and any party, who makes a profession of representing the parties in the oral discussion, may be forbidden to appear (143). If any person interested in the trial has been expelled from the Court with the object of maintaining order, the trial can proceed in the same way as if he had voluntarily absented himself (144).

*Substituted Service of Summons.*—If the summons cannot be served in the ordinary way, it may be delivered to the clerk of the village Court, in the resort of which the place of service is situate, or to the post office of the same place, or the chief of the Commune, or the chief of the Police. It is also published by being affixed to the door of the domicile, and whenever possible, by communication *viva voce* to two neighbours (167). In India the post office is being more and more resorted to as a medium for the service of processes with very satisfactory results. There are many revenue regulations which require the service of notices on persons, or the fixing of notices in particular

localities before estates can be brought to sale, or mutations made in the Proprietary Registers kept by the Collector, &c. Such notices are given to low-paid underlings with obvious results. The system of sending registered notices through the post office eliminates to a very great extent the opportunities for fraud, dishonesty and collusion.

*Service when the Number of Defendants is very large.*—The writer remembers a case in a Behar district in which a Zemindar sued some 250 defendant ryots for a declaration of his right to receive rent. The service of summonses was only effected after an enormous amount of worry, trouble, and expenses. The Zemindar's European manager literally housed and fed a swarm of process-servers for months. Then now and again some defendant would die, and his heirs had to be hunted up and service effected on them. In Germany the Court may authorize service by public notification and service in certain newspapers. Art. 146 of the Italian Code would have just met the circumstances of the Indian case above alluded to: "Where service in the ordinary manner is extremely difficult by reason of the number of persons to be summoned, the Court may authorize service by public proclamation, by insertion in the journal of judicial notices, and in the official journal of the Kingdom, with such precautions as the circumstances require, and, if possible, the Court will select a few of the principal defendants to be summoned in the ordinary way."

*Proof of Foreign Laws.*—The Law in force in another State, customs, and statutes need only be proved if they are not known to the Court. For the ascertainment of such rules of Law the Court is not confined to the matter produced by the parties, but may refer to other sources of information, and pass such orders as appear necessary (265).

*Conciliation.*—In France a preliminary attempt at amicable settlement before the *juge de paix* is obligatory in certain

cases ; but Art. 268 of the German Code merely *permits* the Court to attempt to effect a compromise. Such attempt is also optional in Italy. Under Art. 5 of the Code of Civil Procedure for Geneva no case between husbands and wives, or between those related in a direct line, can be entertained without the permission of the President of the Court ; and he cannot accord such permission unless he has first attempted to reconcile the parties.

*Decrees ultra petita.*—The Court must not give a party what he has not claimed. This prohibition applies particularly to mesne profits, usufruct, interest, and other accessories. But the Court must pass orders as to costs, even if not moved to do so (279). This is contrary to the general rule.

*The Judgment of the Court.*—Judgment can only be passed by those judges who have assisted in the trial (280). The Code does not clearly state if all the Judges who deliver judgment must have been present at *each hearing*. The question is not so important in England and India, where the Court generally consists of a single Judge. But the point has arisen in India as regards Criminal Benches of honorary magistrates. The Calcutta High Court has ruled that the same magistrates must sit throughout a case from commencement to termination. This has caused some inconvenience, owing to the tedious and dilatory procedure in India, where all but the most simple cases are generally adjourned several times.\*

\* In Bengal *two or more* magistrates may form a Bench. A case commences before A., B., C. and D., honorary magistrates. It would seem sufficient if any two of these are present throughout, because two make the necessary quorum. But a case, which was commenced before A., B., C. and D., and in which judgment was delivered by A., B., C. and D., was upset, because C. and D. had been absent at one of the intermediate hearings. A. and B. alone would, under the law, have been a competent Court to sit, and as they did sit throughout, we would think their decision might have stood.

*Delivery of Judgment.*—Judgment must be delivered at the close of the oral discussion, or on some other date, *not later than a week*, to be then stated in Court (281). The words in italics are very important, and substituting perhaps a fortnight for a week, such a provision is much called for to prevent the great delay which often takes place in the delivery of original and appellate civil judgments in India.

*Completion of Judgment.*—Every judgment, which is not complete, at the time it is pronounced, must be completed within a week and delivered to the Clerk of the Court (286). The Calcutta High Court have quashed convictions on the ground of the judgment not having been completely written before delivery.

The judgment must be signed by all the Judges who have taken part in it. The Italian Code also (360) requires the signatures of all the Judges. The French Code (138) requires only the signatures of the President and the Clerk of the Court.

*Persons who may Refuse to Testify.*—The following persons may refuse to give evidence :—

1. A person engaged to one of the parties.
2. The wife or husband of either party, even after the dissolution of the marriage.
3. Persons related to one of the parties in a direct line, or in a collateral line up to the third degree, or those connected by marriage up to the second degree, even after the dissolution of the marriage, which has given rise to the connection.
4. Ministers of religion in respect of what has been confided to them as such.
5. Persons who, by virtue of their employment, status or profession, receive confidences which fall under the denomination of professional secrets, *quoad* such confidences.

Persons in the first three classes must be informed of their right. \*

The German Code rejects the system of incapacity and of exclusion on the ground of unworthiness. The French Code has consecrated the superannuated doctrine of disability, but it nevertheless permits the witnesses to be heard without taking an oath and by way of merely giving information (*renseignement*) to the Court.

The following persons must be examined without administration of any oath: those who are under 16 years of age, or who, by immaturity of understanding or weakness of intellect, are incapable of sufficiently understanding the nature and importance of an oath; and those who are incapacitated by the Criminal Law from being examined as witnesses (358). There is a similar provision in the Italian Code (285), but the age is lowered to 14 years. Persons who may refuse to testify, but do not avail themselves of the right, must not be sworn; nor those who have a direct interest in the issue of the case. But these two classes of persons may be subsequently ordered by the Court to take the oath.

*When a Witness may refuse to Answer.*—A witness may refuse to answer when the answer must directly cause a material injury to the witness or one of his near relatives; when the answer must compromise the honour of the witness, or one of his near relatives, or expose him to a criminal prosecution; and when the witness cannot answer without disclosing an artistic or industrial secret (349).

*Evidence of Experts.*—The party who wishes to offer such evidence must specify precisely the points on which it is required. If there are experts appointed by public authority to give their opinion on special matters, the Court cannot select others in the absence of special reasons. If the parties agree as to the experts, the Court must confirm their selection, but may limit the number (369).

An expert may be challenged on the same grounds as those for which a Judge may be challenged. Public functionaries must not be examined as expert witnesses, if the authority to which they are subordinate certifies that such examination would be prejudicial to the interests of the public service. An expert who refuses to testify is liable to a fine of 300 marks, and also to pay costs; but refusal is allowed in those cases in which an ordinary witness might refuse to testify.

Expert evidence may be given by a written report or verbally in Court; but in the former case the Court may order the appearance of the expert with a view to elucidate his report (376). The French Code requires a written report; where the opinions differ, they are all set out, but without stating from whom they emanate. It is difficult to reconcile this with what is the Law in Italy, and the practice in France (the Code being silent on the point), that experts may be summoned to elucidate their report. Apparently this can only be done if all the experts are of one opinion.

*The Decisive Oath.*—The decisive oath may be put to one party by the other, provided the latter agrees that the case shall be decided accordingly. Hence the fact, proposed as the subject of the oath, must contain in itself all the elements for the decision of the case. If the person, to whom the oath is proffered, refuses to take it, he loses the case. The essence of the oath is that one party leaves the matter entirely to the conscience of the other party. There are similar provisions in the French and Italian Codes. Sects. 8-12 of the Indian Oaths Act X., of 1873, deal with a similar kind of oath, which must be "in some form common amongst, or held binding by, persons of the race or persuasion to which the witness belongs, and not repugnant to justice or decency, and not purporting to affect any third person." Such oaths are generally administered to



Mahamedans on the Koran, and to Hindoos, while holding a piece of the sacred *tulsee* plant, or placing the hand on the son's head.

*Revision.*—In Germany the Court of Revision, when it quashes a judgment on the ground of violation of Law, is bound to send the case back to *the same* Court which has given the decision attacked. The French Court of Cassation need not remand the case to the very same Court, but only to a Court of similar jurisdiction. The Italian Code follows the French Law. The Indian Law is the same, but if the case is sent down for rehearing by another Court, it is generally considered to be a slur on the first Court, and the rigidity of the rule in Germany appears to be an outcome of the same feeling. It is a pity that such a feeling should exist, as when a Court has formed an opinion on a case, it is, perhaps, better that it should go before a fresh Court.

#### IV.—*Laws connected with the Code of Civil Procedure.*

First and foremost is the Law of the 30th January, 1877, for putting in force or giving effect to the new Procedure Code (*Einführungsgesetz zur Civilprozessordnung*). This Law declares the Code to be applicable to all cases of a Civil nature, the cognizance of which belongs to the ordinary Courts. It does not apply to those matters in which administrative authority or the administrative Courts have jurisdiction, or to other special Courts.\*

A Law closely connected with the Code of Civil Procedure is the Law of the Empire of the 18th June, 1878, regarding the costs of justice (*Gerichtsgebühren*). This Law deals not only with the stamps and fees leviable on litigation, but with the cost of justice generally, including the expenses of witnesses and experts, the travelling and

\* *Law of Judicial Organisation*, Arts. 13, 14.

transfer allowances given to Judges, the sums payable to other functionaries, to advocates, &c. Arts. 47 and 48 are worthy of notice; they give the Court the right to impose additional stamp duties on any party who has maliciously raised pleas or intentionally delayed the case by the tardy production of his evidence or otherwise. The Court fees on suits are levied *ad valorem*, the lowest fee being one mark, where the value of the subject matter does not exceed 20 marks, rising to 90 marks when the value ranges from 8,000 to 10,000 marks, with an additional 10 marks for every additional 2,000 marks of value or fraction thereof. Where the value cannot be estimated in money, it is taken to be 2,000 marks, and stamp duty levied accordingly; but the Court may, for exceptional reasons, lower this valuation to a minimum of 200 marks, or a maximum of 50,000 marks.

The profession of Advocate-Attorney has been completely re-organised by the Law of the Empire of the 1st July, 1878, and another law of the 7th July, 1879, regarding fees.

The above are the principal Laws, common to the whole empire, which are connected with the Procedure Code. But almost all the States have passed some new Laws in consequence of the new Code, and to give greater effect to its provisions. Such Laws are of course only in force in the particular State which has passed them.

In Prussia, a Law of the 29th March, 1879, establishing a uniform system of conciliation by arbitrators, deserves special notice. In each Commune is appointed an arbitrator (*Schiedsmann*), whose duty it is to settle disputes. The office is gratuitous and honorary, but cannot be refused without lawful excuse,—such as, the age of 60 years, continuous illness, business which necessitates prolonged absence from home, and indeed any special circumstance which may justly be considered to be a legitimate obstacle. Refusal without lawful excuse involves deprivation of the right

to share in the administration of the Commune, and entails payment of a tax from one-eighth to one-quarter more than that paid by the other inhabitants. The arbitrator is bound to act if called upon to do so by either the plaintiff or the defendant. He may refuse to hear counsel, unless the party represented can neither read nor write. Under Arts. 194 and 232 of the Penal Code, there can be no prosecution for slander, slight violence, or hurt by negligence except on the complaint of the person aggrieved; and the arbitrator is specially enjoined to try and amicably settle such cases. As regards claims against students the Rector of the University is made the conciliation authority.

In Bavaria there is a Law of the 18th August, 1879, regulating the procedure in the case of conflicts of competence between the judicial Courts and the administrative authorities or Courts. In Saxony a Law of the 3rd March, 1879, has established a special Court for the decision of such conflicts; and nearly all the States have passed special Laws to regulate and decide such conflicts.

In Wurtemberg, an interesting attempt has been made in the direction of the cheap and speedy adjudication of petty claims. The Law putting in force the Code of Civil Procedure, has established municipal Courts for the decision of all claims, the value of which does not exceed 50 marks in Communes of the first class, 40 marks in Communes of the second class, and 30 marks in Communes of the third class. The Court is the municipal council of the Commune; but an appeal is allowed within ten days to the ordinary jurisdiction. The Communal Council is also charged, under the orders and direction of the Village Courts, with the execution of decrees against immovable property. This seems an excellent provision, as the local authority would know the value of the property, and be in the best position to prevent sales for inadequate prices, collusion with the underlings of the Court, and fraud generally.

In Brunswick, a Law of the 10th July, 1879, directs that decrees shall be executed against movables before they can be executed against immovable property, except when the latter has been mortgaged to the creditor. There is also a special Law of the 24th March, 1882, laying down in what cases death is to be presumed from absence.

Of course a Law passed by any State must be in harmony with the Laws of the Empire, and must not conflict in any way with the provisions of the Code of Civil Procedure.

H. A. D. PHILLIPS.

## II.—THE INSTITUTE OF INTERNATIONAL LAW ON PACIFIC BLOCKADE.

**A**N international practice which is of entirely modern growth needs to be justified by an evident intrinsic righteousness as well as by a certain amount of actual occurrence in practice. For as International Law rests on the enlightened opinion of nations, nothing can be authorized by it as valid which does not commend itself to that opinion as allowable. A rule which, in itself, does not accord with the general sense of what is right may yet be considered admissible when by long usage or agreement we have come to regard it as established; but a new rule, however often acted upon, cannot be International Law unless it commends itself to the moral sense of the community as fit to be regarded as such.

Pacific blockade has neither been sufficiently long in unquestioned use, nor has it enough intrinsic propriety to give it a place among international institutions.

Its character has fluctuated at various times, from an unwarrantable extension of reprisals, enforced by mere sequestration of the opponent's vessels alone, to a blockade

precisely resembling those usual in war and involving condemnation of neutral ships infringing it. In its essence, and in its least objectionable form, it is a menace, exercised on the very coasts of a friendly State, interdicting its own sea-borne commerce from being carried on, and sequestering every vessel that ventures in or out of its own ports under its own flag, until such State complies with the demands of the blockading power. It is hardly necessary to point out the causes which induce nations to make use of this arrogant means of carrying out their wishes rather than to resort to war. Hautefeuille, who seems first to have given the anomalous proceeding its name, has indicated its unblushing conveniences with a right instinct. It is not humanity which is the principal motive of great powers in instituting such blockades. They know that it will require a heroic effort on the part of a small State to meet their pretensions with active resentment, and they frame their calculations accordingly, so as to avoid the risks and responsibilities which attend a belligerent. In the first place, war is contagious, and if by establishing a blockade a nation enters upon a war, it runs the risk of incurring complications of incalculable gravity. In the second, the issue of war is never quite certain, even if third parties are not drawn into the struggle. There is always the not altogether negligible possibility that Greece may hurl back Persia, England, Spain, the North American States, England, France, Europe. Further, the cost of even a successful war must be serious. No credit, military or other, can be obtained from crushing a weak country. The utmost that can be done is to avoid impairing our own credit by a lengthy or indecisive campaign. The enemy must be annihilated at once, and hopelessly, or opinion reckons us as little superior to our antagonist, and only successful at last by accident. No one can say how much Great Britain suffers in reputation from the initial catastrophes which so often attend its minor wars.

This requirement necessitates immense efforts, and strenuous exertion, in overcoming the mere difficulties of transport and commissariat ; and, after all, the resultant victory is not one to be proud of ; but, at most, one to be pleasantly satisfied with. An indemnity is, as Russia knows, not easy to exact from an enfeebled State whose resources, never great, have been crippled by war ; and some losses are not of a kind to be lightly incurred, whatever the indemnity in prospect.

Again, as Geffcken observes, the name of " war " may raise constitutional or political difficulties at home. " Military operations," or " pacific blockade," are words of Mesopotamian virtue in this connection. Third parties, also, may be misled by the name into affording help to a State which is trying to conquer a friendly power as effectively as any belligerent. Lastly, and most seriously, a State must be very certain of its ground, very sure of the support of general opinion, before it ventures to impose its views on a weak State by war. Universal condemnation, the force of which can never be disregarded (for it is the ultimate basis of International Law) awaits that nation which attacks a helpless country on flimsy or uncertain pretexts. But the very mildness of pacific blockade prevents it from arousing this general opinion of condemnation abroad, except in the minds of those few who realize its true character. If you commence war with a nation, you implicitly reserve, although you may not actually exercise, every lawful means of subjecting it to your will. You may announce your intention of limiting your operations to a blockade ; but the world and your enemy are not bound to take you at your word.\* The latter will take such warlike measures as are proper for destroying your power, irrespective of your declared intentions ; and general opinion will hold you responsible for the violent acts which may ensue, however great your desire to avoid them ;

because, in initiating a state of war, you have given your opponent cause to expect any lawful operations of war at your hands. If, then, blockade implies war, a nation has this salutary check upon making a tyrannical, uncertain, or frivolous demand, that it must accept the world-wide responsibility of commencing war if it attempts to enforce its claim by such means. But, if not, those petty or unjust requisitions which no nation would dream of enforcing on an equally powerful State, or, at the point of the sword, on a less powerful one, may be enforced on the latter by the unsanguinary, unreported, unregarded, but fatally effective poison of pacific blockade.

Such are the effective reasons of its employment. Those publicists who have attempted to claim for it a place in the armoury of nations do so on two main grounds, which may be respectively called the argument from reprisals and the argument from humanity. In the report of Mr. Perels and his reply to Dr. Geffcken at the sitting of the Institute of International Law at Heidelberg in 1887, when the new weapon received a hesitating sanction, the former argument is, almost incessantly, relied upon to brush aside the objections to it which writers of authority had permitted themselves to express. Pistoye and Duverdy, Gessner, Fauchille, Nys, Libbrecht, are all unanimous that blockade is inconsistent with peace. It is considered enough to reply that they cannot at the same time admit the legality of reprisals. But a moment's reflection will make it absolutely clear that we have here a case of far more hostile energy than the mere exercise of reprisals. It is sufficient to put the two modes of procedure side by side. What are reprisals? In the only form in which they present any analogy to pacific blockade, they are a half-obsolete relic of the age of self-redress and private warfare, measures long ages ago permitted to individual subjects by feudal kings; and, in later times, taken under the official direction of the

more coherent modern State, and theoretically tolerated under the strictest limitations. These limitations are not, indeed, touched upon by several writers of recent date, as is natural, in view of the practical disuse of this mode of redress. But they come out quite clearly in the older authors. One would say that they had had pre-eminently in view the vital importance of preventing the exercise of reprisals from being mistaken for what it so easily passed into, viz., open and undeclared war. For instance, the demand must be a matter capable of settlement by a monetary compensation. There must be no real dispute on the merits of the case, and reparation must be frivolously and vexatiously refused or delayed. The utmost measures which are justified are the seizure of a proportionate amount of property belonging to the other State (in extreme cases, perhaps to its subjects) on the high seas. It is an essential feature of the whole modern theory of such reprisals that they consist in the taking (and not in the threat of taking) adequate but not excessive security for the satisfaction of the merest justice. It had been found that the crescendo of exaggerated reprisals of early times had always culminated in war. We may cite the well-known quotation "*Le droit des gens ne permet pas les représailles que pour une cause évidemment juste, pour une dette claire et liquide*" (Vattel, D. d. G., II., 18, § 343). So Ortolan (D. de la M., p. 381) instances as a proper case for reprisals "*si l'une des parties a éprouvé une lésion, a souffert certains torts préjudicant aux intérêts de l'état ou à ses sujets, dont la réparation, susceptible d'être appréciée et convertie en indemnité pécuniaire, lui soit refusée, cette partie a le droit de se faire elle-même cette réparation qu'on lui refuse.*" And Phillimore (III., 20) considers them only permissible in the essentially trivial case of injuries to individuals, and not when the State itself is primarily concerned. But what do the advocates of pacific blockade claim that a nation may



do? They permit it to beset the coasts of its friends, to abolish its carrying trade, to choke its energies, to risk continual collision with its population, to take up undisturbed precisely the most effective position possible for ulterior warlike operations, to usurp jurisdiction over vessels in the very sight of their own country's forts; and this not only to recoup the victims of a clear denial of justice, but for the furtherance of its own political ends. The blockades of Turkey in 1827, of Holland in 1830, of Mexico in 1838, of the Argentine in the same year, of Bolivia in 1879, of China in 1884 were far from being dictated by a desire to take security for liquidated damages.

Would it ever have been said, while special reprisals were an effective reality, that they could have extended so far as to allow a nation to deliberately and avowedly sweep its friend's flag from the seas? and would not such reprisals have been described as "general," and, consequently, universally treated as war, at least in theory? It could not be a serious operation of war to capture a few ships, but it might well be the sole operation of a maritime conflict to institute a systematic suppression of the adversary's trade. And pacific blockade does this, and more. It enables the blow to be struck, not in distant seas and in some proportion to the satisfaction of a just debt, but in the crushing measure necessary for the enforcement of a highly contentious claim, and by the insolent flaunting of material forces in the face of the assailed kingdom. Self-help in a limited degree is permitted by English Law. In the form of distraint it is a useful and not oppressive method of circumventing a dishonest or lazy tenant, by seizing the goods on the premises demised to satisfy an outstanding claim for rent: moreover, it saves the tenant the costs which an action would entail. Shall we, therefore, say that it would be a commendable innovation to allow a claimant, however unfounded, however disputable,

however vague the demand, to seize the person and property of the other party, and detain them until such time as the claim should be satisfied, or the quasi-defendant scrape enough money together to carry through an action for liberation and replevin? The attempt, then, to revive the decayed right of reprisals at sea, to justify pacific blockade does not result in a particularly convincing demonstration of its admissibility. But it is only a formal argument for the practice. The real ground on which it rests is its assumed humanity. We cannot help thinking that just as the vivid impressions of the war of 1870 rendered nugatory, or almost nugatory, that Conference in Brussels in 1874 from which so much was hoped, so the Institute of International Law voted, at Heidelberg, on the present topic under the overpowering influence of the pacific blockade, or, as it would be more properly termed, the war, by which peace was paradoxically secured in 1886. It was common knowledge among those who were acquainted with the progress of events, that the situation in the East was then in a condition of unstable equilibrium. It was assumed that the blockade instituted that summer had led to the modification of the threatened attitude of Greece, and had thereby removed all immediate danger of a war which might have compromised the tranquillity of Europe.

It was natural that the method employed to obtain this relief should have been regarded with a not too critical indulgence; and that a war, justifiable, it may be, on the ground of self-preservation, should have been regarded as no war, but a peaceful violence. And it may be freely conceded that, so far as external suffering goes, pacific blockade is a mild measure. Even if we look below the surface, and at the disastrous results of such an interruption of commerce, none the less disastrous because special correspondents do not go to write long letters about them, or because starvation is a more common phenomenon than

shooting, this is still the case. As a mild measure of war, blockade is admirable. But as a measure of peace it has two fatal faults which counteract its humanity; it is insolent, and it is one-sided.

M. de Lavelaye's words on a different subject may be fitly applied, with the necessary modifications, to the case of pacific blockade. We need only read "admirable" "substitute for" in place of "admirable means of" war, and "blockade" for "capture." "M. Lorimer considère "la capture comme un admirable moyen de faire la guerre, "parce que . . . 'il ne verse pas de sang, ne "sacrifice pas de vie, ne met pas les demeures en "péril . . . ' Tout cela est parfaitement vrai; mais "on peut en dire tout autant de la saisie des biens "des habitants sur terre; on peut même les emmener "prisonniers et les réduire en esclavage, sans verser le sang "et sans tuer personne. Quand ils détroussent des "voyageurs désarmés, ceux qui opèrent sur les grands "chemins ne tuent personne non plus. Tout cela ne prouve "rien. Ce qu'il s'agit de savoir c'est si cet 'admirable "moyen de guerre,' si anodin et si humain, est conforme "au droit, s'il est efficace, et s'il n'est pas contraire aux "sentiments d'honneur et d'équité que dix-neuf siècles de "Christianisme et de progrès ont développés parmi nous." —(*Rev. de Droit. Int.*, VII., 589.)

Two States can always be at war. However strong the one and weak the other, the strongest is always open to the desperate efforts of its antagonist. Even if it is not actually attacked or resisted by force, it feels itself liable to be so at any moment. But two States cannot pacifically blockade one another; and no reprisals which the weaker can make are at all comparable with blockade in intensity. A mild measure it may be; but such harshness as is in it must be felt by one side alone. Reprisals, such as are ordinarily recognised in theory, are only (and scarcely) redeemed from

insolence by their long usage and authority. But we have seen that they are not comparable in extent and audacity with blockade. A nation which coolly sets to work to draw a cordon round its friend's coast with the express view of coercing it by 'sequestering its marine, is guilty of an affront which no refusal to comply with its wishes on the part of the latter can extenuate, and one which naturally leads to still more glaring violations of law, as, for instance, when the Austrian sailors in 1886 actually landed on Hellenic territory, and a scuffle took place between them and the islanders. And the assumption that the other State will not resent the insult, without which assumption the blockade would be ridiculous, is itself the most arrogant contumeliousness possible. This is not mere exaggerated sentiment. Rolin Jacquemyns quotes a despatch of the British minister at the Hellenic Court, referring to "*la dignité calme qu'a toujours gardée la population, dans des circonstances dont l'honneur national ne pouvait que se sentir atteint.*" He, at least, recognized that the proceedings of his government were not consistent with the honour of an independent kingdom. Humanity is well, yet mildness may be carried too far. What if one should say: "I claim heavy damages from you; but I am a humane man, and instead of putting you to the expense of a ruinous action, I propose merely to ask you to stand still whilst I blacken your eyes, unless you choose to pay me what I ask." Would the humanity of the speaker be exhibited in a peculiarly attractive light? Peculiar, possibly, but hardly attractive.

So far we have considered the legality of the establishment of blockades in time of peace. Let us now see whether it is possible; that is, whether the institution of such an organized measure of sequestration does not amount to war.

And let us not be misled by the not uncommon theory which refers the decision of the question whether war does or

does not exist, in a given case, to the light in which the assailed State regards the acts of the assailant. It is true that outward acts of violence may not amount to war if the attitude of the government which would under ordinary circumstances be injured thereby is an attitude of consent. It may have invited the commission of the acts, as in the case of asking foreign assistance to suppress a rebellion. It may have sold or bargained the right to commit them, as when a State permits another to occupy temporarily a portion of its territory. But submission is not consent, as every student of criminal law is aware; and the danger is lest it should be inferred that because a State, in the face of hostile acts, chooses to do nothing, it therefore consents to waive the fact and not to treat it as war. Whereas it cannot help itself; nothing it can do or leave undone will make that peace, which is not peace. It may not insist on the rights of a belligerent, it may not suspend its diplomatic relations, it may tacitly allow the war to drop, if the other party will permit. But if a nation shews its immediate intent to enter on a *régime* of violence towards another nation (outside the strict limits of reprisals) without the perfect consent of the latter, there we have war, and no act or behaviour on the part of the State assailed can make it anything else, except by altering the intent of the aggressor.

Tried by this test, pacific blockade has every characteristic of war. Think for a moment what the consequences would be of declaring blockade illegal in peace time only, leaving it to the blockaded State to declare war if it chose. On that unfortunate country would fall the odium of disturbing the world's peace by commencing war, and on it would fall the main horrors of the contest, on account both of its being necessarily by far the weaker party, and because the enemy's vessels would have taken up advantageous positions under cover of their "pacific"

intentions. The terrible alternative of denouncing a disastrous war, or of acquiescing in a blockade which so glaringly brings into contempt the national sovereignty, is one which ought not to be offered to a State. It should be impossible for it not to treat as hostile such an attack on its independence, or for strong Powers to imagine that they can openly infringe the jurisdiction of the weak without necessarily incurring the risks of war. Again, if pacific blockade be not war, and yet so closely resembles it, there is introduced an element of extreme complication into what is already a difficult enough question to resolve, namely, that of determining the moment when war begins in any given case. In old days, when a declaration was considered an essential preliminary to the exercise of lawful hostilities, previous acts of violence might be called "reprisals," and permitted without complicating matters: but now that the commencement of war no longer dates from the issue of a formal proclamation, but has to be inferred from the temper and conduct of the parties, it is of extreme importance that the line between peace and war shall be sharply and clearly drawn. We can no longer draw it by reference to a document: we must not permit it to be blurred by the growth of ambiguous conditions, which are called peace, but are so like war as to slide imperceptibly into it. And this tendency to slide into open war is itself a snare in the path of those who employ pacific blockades. If the only alternative to waiving its demand were war, a nation might well hesitate. Its claim may be dubious, trivial, or arbitrary. But it thinks it may venture on a blockade, and it finds in a short while that it has drifted into unmistakable war, as at Navarino, San Juan d'Ulloa, and the Taku forts. Unless we regard such blockades, not as *casus belli*, but as *bellum*, our attitude will be inconvenient and ineffective.

But it may be said that argument comes too late, that

reason and principle are confronted by authority. It is proposed to examine a few leading authors' opinions as indicative of the current of juristic opinion on the topic. The earliest writer who seems to distinctly refer to it is Hautefeuille, who is concerned with its bearing on the rights of third parties. But this does not prevent his pronouncing an unhesitating condemnation of the entire practice. "Je dois déclarer "que . . . je ne puis concilier l'idée de paix et "d'amitié avec celle de blocus. Les résultats de ces "opérations ne furent jamais propres à modifier mon "opinion. Le blocus de la Grèce se termina par la bataille "de Navarino; celui des côtes Mexicaines, par la prise de "vive force de San Juan d'Ulloa; après cet acte pacifique "les Mexicains se crurent autorisés à déclarer la guerre à la "France. Enfin le blocus de Buenos Ayres amena un "assez grand nombre d'expéditions, dans lesquelles les "bâtiments Français et Anglais, ainsi que leurs embarcations, "en prenant, brûlant ou détruisant des bâtiments Argentins, "ont tenu une conduite que, malgré toute ma bonne "volonté, je ne puis appeler pacifique. Je ne pense pas, "en effet, que l'on puisse prétendre qu'il y a attaque d'une "nation par une autre nation, sans guerre." (*D. des N. Neutres*, II., 272), and the same sentiments are expressed in the *Histoire du Droit Maritime International* (p. 374).

Ottolani considers reprisals out of date, and does not mention pacific blockade; this is strange, for the then recent blockades of the Mexican and Argentine coasts instituted by France in 1838 are incidentally referred to in "*La Diplomatie de la Mer*." However, the opponent of reprisals as a modern institution could not but condemn the practice, and probably Ottolani thought the proceedings of the Government tantamount to war.

Cauchy is claimed again and again as an advocate of the propriety of such a measure. But it is obvious, on

the face of it, that what Cauchy is really defending is what Hall energetically reprobates under the name "commercial blockade," *i.e.*, the institution, in war, *bien entendu*, of a blockade, not as ancillary to military operations, but as the sole means of bringing the enemy to terms. Cauchy says, quite distinctly, and very sensibly, "Il n'existe pas, que je sache, de principe de morale ou de droit qui oblige un *belligérant* à recourir à tous les moyens de guerre à la fois" (II. 426), and approves of blockade as a humane measure, and one to which benevolent belligerents will do well to restrict themselves. But in treating of mere reprisals, he condemns them utterly (*D.M.I.*, I., 363).

Pistoye and Duverdy are emphatic on the same point. Their reasoning has never been really assailed. "Mais que décider si la guerre n'existe pas entre la nation bloquante et la nation bloquée? Et d'abord peut-il se faire que la guerre n'existe pas entre ces deux nations?" "Pour nous, nous ne le pensons pas. Comment peut-on dire que le fait de bloquer les ports d'un État, d'interrompre ses relations commerciales, d'entraver sa liberté, n'est pas une acte d'hostilité?" (*Traité des Prises MM.*, I. 376.)

Gessner is equally positive: "Sans doute, un blocus pacifique n'est qu'une guerre restreinte" (*D. des Neutres*, p. 217; and see especially pp. 220, 221). It is "une institution, qui heurte de front toutes les règles du bon sens" (p. 218); and Woolsey's and Halleck's concurrence in the same view is well known.

M. Rolin's report to the Institute of International Law at the Sessions of the Hague, in 1875, stated that the majority of the Sub-commission on this subject were opposed to pacific blockade. Mr. Westlake, Q.C., had given the opinion "qu'il n'est pas digne d'un grand état, qui croit avoir à se plaindre d'un petit, de chercher à s'appropriier les côtés faciles de la guerre sans en courir les



"risques. . . ." With apparent irony, M. Bulmerincq considered pacific blockade to be "aussi licite que tout autre moyen de guerre." M. Rolin himself said that "le blocus pacifique est une véritable acte d'hostilité, qu'il s'agit simplement ici d'une qualification vicieuse, et que sauf à lui enlever cette qualification, il faut lui reconnaître les mêmes effets qu'au blocus ordinaire."

Dr. Geffcken (cited *Journal de D. I. Privé*, 1884, p. 576), says:—"Il est evident que le blocus soi-disant pacifique n'est pour un Etat puissant qu'un moyen d'imposer sa volonté à un Etat faible, sans recourir aux efforts et aux responsabilités qu'entraîne la guerre. Un Etat de puissance égale ne se soumettrait pas à une pareil traitement."

We will add the names of Fiore (cited, *Journal, ut supra*, p. 574), and Amari (*ibid.*), as opposed to the recognition of blockades in time of peace.

It is probably true that most of these authorities had chiefly in contemplation a blockade enforced against neutrals.\* But their reasoning is not at all weakened by this fact. Their condemnation of the idea that a blockade can occur in peace-time does not rest on the precise extent, but on the intrinsically hostile and serious character of such a proceeding. The latter does not lose this formidable nature simply because commerce is not absolutely interdicted, but vessels of the blockaded country only are attacked. That is, from this point of view, a quite subordinate point. The essentially threatening and coercive belligerency, implied in the institution of any blockade, remains the same.

On the other hand the practice is, in varying terms, approved by Heffter, Calvo, Perels, Hall, and Bulmerincq. Heffter says: "La légalité de cette mesure ne peut faire

\* But Hautefeuille, at least, regarded the question as turning on the direct attacks by the blockading power on the blockaded one (*vide supra*).

"l'objet d'aucune doute" (II., § III). He gives not the slightest reason for this sweeping remark, except the citation of four cases, two at least of which, the blockades of Turkey in 1827 and of Mexico in 1838, are in every way capable of treatment as undeclared war. And it is noteworthy that Heffter is especially anxious that declaration should be regarded as an essential preliminary to war; consequently, he could not, without some inconsistency, treat pacific blockade as amounting to the exercise of hostilities.

Calvo (*D. I.*, IV., 192) accepts the principle, but only in case of a "cause vraiment juste," which has, "so to speak, "made it a necessity," a very vague approval which might mean anything. Bulmerincq (*Four.*, *ut supr.*, p. 569) expresses a similar conviction of the legality of blockade in peace-time, under stringent limitations, and not affecting neutrals. He seems to miss the point of the objection that blockade is necessarily a warlike act. That objection is treated by him as a formal one, and he meets it in effect by saying that rules have their exceptions (p. 575): whereas it is not the mere fact that blockade has been universally regarded as a belligerent right, but its essentially warlike nature, to which the opponents of its "pacific" character point. Perels (*ib.*, 578) gives the alleged right a thorough-going approval on the ground of its being a less evil than war, and is followed by Hall, who however, seems to think that the blockaded power may consider the institution of the blockade as initiating war if it chooses. This choice, we submit, it cannot and ought not to be called upon to make. Hall thinks that a method is necessary for dealing with States which presume upon their weakness; which is no reason for giving large States increased facilities for tyranny.

Such (the last excepted) were the authorities *pro* and *con* which induced the Institute of International Law to vote at

Heidelberg an approval of pacific blockade, much on the lines of Bulmerincq's later views as expounded in the *Journal de Droit International Privé*, but with less stringent limitations. Their vote has been adverted to above. A calm consideration of the true nature of this alleged institution of the Law of Nations, of its liability to abuse, of the unfair responsibility thrown by it on those least able to bear it, of the facility with which it may (to the chagrin or secret satisfaction of its originator) lead to war, the onus of beginning which will probably be placed on the wrong party, of the distracting confusion which it would introduce into the decision of the all-important question whether two nations are at peace or war, of its insolent and one-sided oppressiveness, will, it is confidently hoped, lead the lovers of justice in all countries to pause before they ratify such a monstrous doctrine by general assent.

TH. BATY.

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### III.—SOME THIRTEENTH CENTURY STATUTES.

THE practice of enrolling legislative Acts upon the Statute Roll commences in the year 1278. In that year, namely, the 6th year of Edward I., the Statute\* of Gloucester is found there enrolled, and until the end of the century many, but not all, subsequent Statutes appear there likewise. Thirteenth century Acts frequently appear upon the Patent and Close Rolls, and it is probable that some might be discovered on the Plea Rolls, and especially on the Coram Rege Rolls; but some Acts seem never to have been enrolled at all; and our acquaintance with them is

\* \* I have found it convenient in this article to speak of the *Statute of Gloucester* instead of the *Statutes of Gloucester*, as they were originally called; and so with other Statutes.

derived from the private collections of Statutes made for the use of students and practitioners of the law in the middle ages.

The codices in which these collections were written contained other legal matter, such as the *Registrum Brevium*, Hengham, Fet a saver, and extracts from these and other treatises. Some of these extracts were occasionally described as Statutes and printed as such in the 16th century. In the Statutes of the Realm, they are, together with other instruments, described as *Statuta Incerti Temporis*, and placed at the end of the Statutes of the reign of Edward II.

An example of an article improperly called a Statute is furnished by the *Statutum De Tenentibus Per Legem Angliæ*. This "Statute" is neither more nor less than part of Chapter 18 in Book 7 of the great work of Ranulph de Glanville. It was described as a Statute in the codex at the British Museum now catalogued as Harleian MS. 867, f. 64, r<sup>o</sup>., and was printed by Berthelet in his *Secunda Pars Veterum Statutorum* (1532). The *Statutum de Magnis Assisis et Duellis* is another example. It was printed by Tottell in his *Magna Carta* (a collection of early Statutes) in the year 1576. But it is no Statute; it is taken from an unprinted treatise on pleading known as *Brevia Placitata* written in the 44th year\* of Henry III. or thereabouts. It may be objected that the appearance of this article in a legal treatise is not inconsistent with its being a Statute. But the fact that it appears, apart from *Brevia Placitata*, in none of the 13th century codices, and in a few only of the 14th century, would in itself be a sufficient answer to this objection, even if its language were not unmistakably a commentator's, not a legislator's.

There are other articles included in *Statuta Incerti Temporis* which were mere administrative directions to the

\* I give this date after having studied all the MSS. of this treatise with which I am acquainted.

King's officers. For example, the *Capitula Itineris* were the agenda of the Justices in Eyre; the articles called *Visus Franci Plegii* were the agenda of the Sheriffs in their Tourns. The *Capitula Itineris*\* varied from year to year.

Britton says:—

“ Les chapitres neqedent qe lour deivent estre deliverez ne sunt mie numbrez en certeyn. Car ausi cum les malices de gentz crescent, si covent de acrestre chapitres et autres remedies.”

It is doubtful whether these chapters ought ever to have been published among the Statutes, and whether they ought properly to be retained in a future edition. If, however, they are retained, the variations in them should be set out as far as possible, and discussed in detail.

The Articles of the Tourn (*Visus Franci Plegii*) probably varied in form more often than the chapters of the Eyre. The Sheriffs perambulated their counties not once in seven years, as did the Justices in Eyre, but twice at least in every year. It appears from the Hundred Rolls that they occasionally held Tourns three times a year; but this was illegal. Perhaps, too, the articles varied slightly in different counties. A Sheriff would be inclined to adopt a variation from the standard form made by his predecessor; we may be certain that a new form was not frequently provided.

The Statutes of the Realm do not contain the *Capitula de Regardo*, which certainly deserve a place beside the Chapters of the Eyre. They occur on the Close Roll§ of 4 Edward I., and on several other Close Rolls of that reign.

The *Articuli super Statutum Wintonie* are of the same nature as the *Capitula Itineris*; they were the agenda of the persons sent into each county to enquire whether the

\* Edition Nichols, Vol. I., page 24.

† Printed under that title in Statutes of the Realm, Vol. I., p. 246.

‡ These interesting chapters deal with forest law.

§ Close Roll, 98, M.I., in dorso. Also on Close Roll, 67, M. 12 in dorso.

Statute of Winchester had been observed. That Statute was made on the 8th October, in the thirteenth year of Edward I., although some manuscripts give the date as the 20th September. The King was at Winchester, or in its neighbourhood, on both days, but the Annals of Waverley\* tell us :—

“Item dominus Eadwardus rex Angliæ, in principio mensis *Octobris*, apud Wintoniam, quædam statuta edidit ad refrænandum latronum et prædonum insidias et violentas truculentas.”

The Statute provided no machinery to enforce its provisions; accordingly, early in the fifteenth year of his reign, the King sent two knights into each county to enquire whether it had been properly observed. The first words of the writ† appointing them were in this form :—

“Rex dilectis & fidelibus suis Willelmo de Stirkelande & Roberto le Engleys salutem. Cum nuper nobis apud Wintoniam existentibus de consilio magnatum & procerum regni nostri quedam statuta tunc ibidem edita ad pacis & tranquillitatis regni nostri conseruacionem & eiusdem pacis perturbatorum maliciam reprimendam per totum regnum nostrum predictum mandauerimus in singulis suis articulis custodiri firmiter & teneri ac postmodum ex querela intellexerimus diuersorum quod statuta predicta non sunt prout nobis & eidem regno expediret modo debito obseruata Nos nolentes quod ea que pro eiusdem regni vtilitate comuni prouido consilio sunt, prouisa per subditorum negligenciam seu impericiam in perpetratorum huiusmodi continuacionem celerum‡ remaneant non secuta

\* *Annales Montastici*, ed. Luard. (*Chron. and Mem.*), 1864-5, Vol. II., page 403.

† *Pat. Roll*, 105, M. 13.

‡ *Scelerum* is intended.

assignauimus vos ad videndum & plenius inquirendum. . . . ."

The writs, which are dated the 20th January, follow very closely the words of the Statute, and the Articles of the Statutes of the Realm are apparently a mere abridgement of the clauses in these writs. As to the *Assisa Panis* and *Assisa de Ponderibus et Mensuris*, we have the following statement in the *Annals of Burton*.\*

"Eodem annò (1256) missi sunt iusticiarii per regnum Angliæ ad omnes civitates et burgos, pro mensuris quibuscumque mutandis, augendis, vel minuendis, et corrigendis. Qui etiam per loca assisam panis, vini, et cervisiæ sub forma tradiderunt subsequenti: "

This is followed by an article similar to the *Assisa Panis* in the Statutes of the Realm, except that the calculation is taken as far as the weight of bread, when the price of wheat is twelve shillings a quarter. The scale of prices also occurs in *Bracton's Note Book*,† but the rest of the article is not found there. No inference as to its date can be drawn from its appearance there; for Professor Maitland tells us that it is written in a later hand than the rest of the *Note Book*.

The statement in the *Annals of Burton*, too, must be received with caution; it is not found in any of the other Monastic Annals,‡ and it is possibly misplaced. It seems, however, clear that persons were from time to time assigned to inspect weights and measures in the different counties. Thus on the Patent Roll § of the 56th year of Henry III. : we find—

"Rex omnibus, &c., Salutem. Cum measure bussellorum galonum vlnarum & ponderum vne & eedem esse

\* *Ann. Mon.*, Vol. 1., page 375.

† Vol. III., p. 301.

‡ Nor can I find any reference to the subject on the Patent Roll of 40 Henry III.

§ *Pat. Roll* 89, M. 4. I have some recollection of a writ of the same nature on an earlier Patent Roll, but, if there is one, I have been unable to find it again.

debeant per totum regnum nostrum & per balliuos nostros quos ad hoc deputare volumus videri probari & mensurari assignauimus dilectos & fideles nostros Gilbertum filium Hugonis & Ricardum de Quercu ad videndum probandum & mensurandum bussellos galones vlnas & pondera in omnibus burgis & villis mercatoriis in Comitatibus Suffolcie & Norfolcie & ad transgressores mensurarum predictarum tam infra libertates quam extra amerciandos & ad omnia alia facienda que ad huiusmodi officium pertinent. Et ideo vobis mandamus quod predictos Gilbertum & Ricardum cum ad vos venerint ipsos ad predicta facienda admittatis eisdemque in premissis intendentes sitis & respondentes et bussellos & galones vlnas & pondera villarum predictarum ad mandatum ipsorum coram eis venire faciatis. In cuius, &c."

The Justices referred to in the Annals of Burton were, no doubt, like Gilbert fitz Hugo and Richard de Quercu, sent for the special purpose of inspecting weights and measures. They cannot have been the ordinary Justices in Eyre because they are said to have been sent to *all* the boroughs and towns, and we know from the Feet of Fines that the Justices in Eyre were not so sent. It is not improbable that the statement in the Annals is correct; and if so, the Assisa Panis and the Assisa Ponderis et Mensurarum may well have been framed in the year 1256; possibly they are of an earlier date.

The same group includes the oaths of the Sheriffs, the King's Counsellors, the Bishops, the Escheators, the Mayors, and Bailiffs, which, standing by themselves, are certainly not Statutes. It may well be that in the middle of the 13th century, the legislature—such as it was—from time to time determined the forms of oaths which the King's officers should take. The Provisions of Oxford



contain forms for the "Twenty Four," the Chief Justice, the Chancellor, the Guardians of the Castles and the King's Counsellors; and Henry III. himself issued a proclamation\* on the 20th October in the 42nd year of his reign, in which he stated that he had caused all the Sheriffs to take an oath in the form there proclaimed. This oath differs entirely from the one printed in the Statutes of the Realm; it contains several clauses relating to the meals which the Sheriffs might claim, the places where they might lodge, the servants they might keep, and other clauses no doubt highly beneficial to the people who had suffered by their exactions. After the royalist victory at Evesham the oath in this form was probably abolished; but at what time the form given in the Statutes of the Realm came into force cannot be stated with certainty. We may notice, however, that the Memoranda Roll,† Q.R., of 1 and 2 Edward I., contains a form of oath to be taken by the Sheriffs. In the margin of the roll are the words *Sacramentum Vicecomitum*, and the text opposite to them is in substance the same as in the printed version now under consideration. But the words on the roll are in the third person, beginning thus:—*Les viscountes & baillifs iurrunt ke eus leaument servirunt le Roy en tel Office.* . . . . The words in the printed version are in the second person, beginning thus:—*Vuz jurretz que bien & loiaument serviretz le Roi en loffice de Visconte.* . . . . The following words, too, which are in the latter are not in the former:—*Ou autre Justices assignetz en mesme la countee ou Justice de Neugate; and also the following:—*• *Et que nul baillif ne ministre qi ad este od lautre viscontes retendretz en vostre service.*

It is improbable that this oath was the result of any legislative Act of the first or second year of Edward I.

\* Ann. Mon., Vol. I., p. 453.

† Mem. Roll, Q.R. 49, Rot. 1, in dorso.

The entry on the roll may well be merely a memorandum of the form actually in use at the time of the enrolment. Probably, as stated above, it was framed shortly after the battle of Evesham; it may even have been in use before the Baron's war.\*

Considering next the Statute of Exeter, which is included among those of uncertain date, it should be noticed in the first place that it is in two parts, and that these parts are occasionally written as separate instruments, the second being then called *Articuli Exonie*. There is, however, no reason for supposing that they were enacted at different times. They are generally found together, and the second part may be regarded as supplementary to the first, but sufficiently distinctive in character to be read separately. The Statutes of the Realm contain both parts in a single instrument, but the words *Articuli Exonie* are written in the margin against the second part. It is there printed without any date, but in the early printed editions the words "*Done a Excestre le xviii jour de Septembre lan de Regne le Rei Edward xiii*" occur at the end. In most of the manuscripts the same words occur, except that the date is given as "*le xxviii iour de Decembre.*" The date given in the 14th century manuscripts would, in any case, be preferable to that given in the 16th century printed books, but the manuscript date is confirmed by the fact that the King was at Exeter on the 28th December, whereas on the 18th September he was at Westminster.

It should be noticed that Britton† refers to the Statute of Exeter, and though the exact date of that work is still

\* A form of oath for the King's Judges is given on Rot. 6 of Mem. Roll, Q.R. 64, one of the rolls for 18 Ed. I., the year of the great judicial scandal.

Vol. I., page 86.

uncertain, it is generally admitted to have been written within the first 20 years of the reign of Edward I.

The Statute of Jewry does not purport to be dated; and to ascertain its place in the Statute Book, we must refer to its contents. The editors of the Statutes of the Realm state that it has been attributed to the 18th year of Edward I. (presumably because the Jews were banished in that year), and to the fourth year of the same reign. It will be shewn that neither of these dates is correct. By one of its provisions Jews are forbidden to lend money at usury; by another every Jew, after attaining seven years of age, is required to wear a badge in the form of two tables joined upon his outer garment.

Now, from the Annals\* of Waverley we learn that a Parliament was held at Westminster in the Octaves of St. Michael, and that a Statute was then passed relating to the Jews.

*“Item hoc anno rex Edwardus, in octabis Sancti Michaelis, ad parliamentum omnes regni proceres jusserat evocari apud Westmonasterium, in quo statuta multa ad utilitatem fuerant publicata. Inter quæ Judæis fuit interdicta licencia effrænata usurandi; et ut deinceps possent manifeste a Christianis discerni, preceptum est quod ad instar tabularum Moysi ad unius palmæ longitudinem signa ferrent in exterioribus indumentis.”*

The words of the annalist, confirmed as they are by others in the annals of Winchester, Osney, and Worcester, and by the Chronicle of Thomas Wykes, are almost sufficient to establish the date of the Statute. But we have other evidence from the Rolls.

The Jews were banished in the 18th year of Edward I., and there is an instrument on the Close Roll of that year

\* Ann. Mon., Vol. II., p. 385.

which has been called Statutum\* de Judæis exiundis [sic] regnum Angliæ.

The same instrument is found on the Memorandum Roll,† Q.R., 65, from which the text written below is taken, the portion of the Close Roll on which it is written being much damaged.

“ Rex‡ Thesaurario & baronibus de Scaccario salutem  
Cum dudum in parlamento nostro apud Westmonasterium in quindena Sancti Michaelis anno regni nostro tercio ad honorem dei et populi regni nostri vtilitatem ordinauerimus & statuerimus quod nullus Judeus eiusdem regni extunc aliquid sub vsura Christiano alicui mutuaret super terris redditibus seu rebus aliis set per negociaciones & labores suos ducerent vitam suam ac iidem Judei postmodum maliciose inter se deliberantes vsure genus§ inde-  
terius quod Curialitatem nuncuparunt immituantes||  
populum nostrum predictum sub colore huiusmodi circumquaque depresserint, errore vltimo priorem duplicante; per quod nos ob scelera sua & honorem crucifixi Judeos illos tanquam perfidos exigere¶ fecimus regnum nostrum Nos priori opcioni nostre fieri nolentes inconformes set potius eam imitantes penas omnimodas & vsuras & quodlibet genus earundem que occasionibus quibuscumque ratione Iudaismi a Christianis aliquibus regni nostri exigi poterunt

\* Close Roll, 112, M. I. In Add. MS. 32,085, f. 122 rº, at the British Museum.

‡ On Rot., 4.

† This writ, which may, I think, fairly be called a Statute, has not before been printed from the Memorandum Roll. I therefore give it in full.

•§ Add. MS. has *fenus*.

|| Close Roll has *immitantes*. Add. MS. has *imitantes*.

¶ Close Roll and Add. MS. have *exire*, which seems a better reading.

de temporibus quibuscumque totaliter dissipamus\* & annullamus Nolentes quod aliquid a Christianis predictis ratione debitorum predictorum modo aliquo exigatur preterquam debita principalia tantum que a Judeis predictis receperunt quorum quidem debitorum quantitates volumus quod Christiani predicti per sacramentum trium† proborum & legalium hominum per quos rei veritas melius sciri poterit verificent coram vobis & eas extunc nobis solvant terminis competentibus eis per vos statuendis. Et ideo vobis mandamus quod gratiam nostram predictam sic pie factam in scaccario predicto legi & in rotulis eiusdem scaccarii irrotulari & firmiter teneri faciatis iuxta formam superius annotatam. Teste me ipso apud Kingescliptone v. die Novembris anno regni nostri xvijj.”

This entry and the statements of the Annalists prove clearly that the Statute of Jewry, printed in the Statutes of the Realm, was made by a Parliament held in the Quinzaine of St. Michael in the third year of Edward I.

There was an earlier Statute of Jewry ‡ made in the 55th year of Henry III., which is of some interest as being the earliest legislative Act called a Statute. It ends thus:—

“Et ideo vobis precipimus firmiter iniungentes quod provisionem ordinationem et *statutum* predictum publice per totam balliuam vestram proclamari et firmiter teneri & observari faciatis. In cuius, &c., Teste Rege apud Westmonasterium, xxv die Julii.

“Eodem modo mandatum est singulis vicecomitibus per Angliam Teste ut supra.”

\* *Diferamus* in Add. MS.

† Omitted in Add. MS.

‡ Pat. Roll, 88, M. 10, in dorso. It is also in *De legibus antiquis* (printed by the Camden Society), and Rymer's *Fœdera* (Record Com.), Vol. 1, p. 489.

Earlier Acts were called Provisions; and, however convenient it may be to speak of them as Statutes, the word is improperly applied to them.

The Parliament of the autumn of the third year of Edward I. also enacted the Statute of the Exchequer.

The fifth section of that Statute provides that the Sheriffs, except in the counties of Westmoreland, Lancaster, Worcester, Rutland, and Cornwall, shall keep the King's wards and escheats which shall be within their shires. The seventh provides that the Sheriff of Cumberland shall act as escheator in Westmoreland and Lancashire, the Sheriff of Northampton in Rutland, the Sheriff of Gloucester in Worcester, the Sheriff of Devon in Cornwall. The ninth provides that three able persons shall keep the king's demesnes, and shall approve them as they shall think best for the king's advantage.

The following extracts from the Fine and Patent Rolls\* of Edward I. prove conclusively that the Statute was made in that year :—

“ De escaetaria deliberanda.

“ Rex dilecto clerico Iohanni de Lond, escaetori suo citra Trentam salutem. Quia de consilio nostro providimus quod officium Escaetorie per totum regnum nostrum de cetero per vicecomites nostros fiat et expleatur vobis mandamus quod officium escaetorie citra Trentam vicecomitibus comitatum eorundem preterquam in Comitatus Rotelandie Cornubie and Wygornie & officium eschaetarie in Comitatu Rotelandie Vicecomiti Norhamptonie & officium escaetarie in Comitatu Wygornie vicecomiti nostro Gloucestrie & officium escaetarie in Comitatu Cornubie vicecomiti nostro Deuonie liberetis cum wardis & escaetis que sunt in custodia vestra vna,

\* Fine Roll, 72, M 5.

cum instauro & omnibus aliis bonis nostris in eisdem existentibus per cirograffum inde inter vos & ipsum conficiendum ita quod. nobis inde respondere possint ad scaccarium nostrum Prouiso quod dominica nostra & alie terre nostre que nobis remanent in feodo & hereditate in manu vestra retineantur donec aliud inde preciperimus Teste Rege apud Westmonasterium iij die Novembris.

“ Consimiles littere diriguntur Philippo de Wileby Escaetori ultra Trentam Et mandatum est ei quod officium escaetarie in Comitatibus Northumberlandie, Cumberlandie, Nothinghamie & Derebie vicecomitibus eorundem comitatum & officium eschaetarie in Comitatibus Westmerlandie, Cumberlandie & Lancastrie vicecomiti Cumberlandie liberet Teste ut supra.

“ Rex\* omnibus, &c. Cum commiserimus dilecto & fideli nostro Radulpho de Sandwico omnia dominica in Comitatibus Surreie, Sussexie, Suthamtonie, Wiltescire, Somersetie, Dorsetie, Deuonie, Gloucestrie, Herefordie, Wigornie, Sallopie, Staffordie, Oxonie, & Berkscire custodienda quamdiu nobis placuerit prout in literis nostris patentibus sibi inde confectis plenius continetur Nos . . . . concessimus ei quinquaginta libras singulis annis. . . . In cuius, etc., Teste Rege apud Westmonasterium xij die Nouembris.

“ Consimiles litteras habet Thomas de Normanuilla pro custodia dominicorum Regis in Comitatibus Eboraci Northumberlandie, Westmorelandie, Cumberlandie, Kancie,† Nothinghamie and Derebie.

“ Consimiles litteras habet Ricardus de Holebroke pro custodia dominicorum Regis in comitatibus Essexie,

\* Patent Roll, 93, M. 2

† Lancastrie is intended.

Hertfordie, Norfolcie, Suffolcie, Lincolnie, Hunte-donie, Cantabrigie, Buringhamie, Bedfordie, Norhamtonie, Rotelandie, Warrwici, Leycestrie and Middelsexie."

The county of Kent is not mentioned in the writ to Ralph de Sandwich; but the omission must have been accidental, for a writ\* of 4 Edward I. exists in which he is described as steward of the King's demesnes in that county.

The letters patent appointing Thomas de Normanville and Richard de Holbroke are found upon the Fine Roll, but a blank space has been left for the appointment of Ralph de Sandwich. They describe fully the duties of the stewards of the King's demesnes, but their length renders it impossible to print them here.

Let us now turn to some of the manuscripts to see what light they throw on the Statutes last considered. Of the Statute of the Exchequer there are many manuscripts, they occur, in fact, in most collections of early Statutes, but some do not contain the four chapters described as *Districciones Scaccarii* in the Statutes of the Realm. These chapters have the appearance of an interpolation; their subject matter is unconnected with that of the rest of the Statute; and they are frequently found written by themselves as a separate instrument. The objection may, therefore, be taken that they are a Statute of a different date. It would be easy to show that certain passages in the *Capitula Itineris* of the reign of Edward I. are an answer to this objection; but it is not necessary, as there is other sufficient evidence. There are in the Harleian and other collections of manuscripts at the British Museum, several codices in which the Statute of Jewry is written. First there is the one in the Harleian collection numbered

\* *Vide Inq. Post Mortem*, 4 Ed., i., No. 86.



409; it contains the Statute of the Exchequer.\* At the place where the *Districciones Scaccarii* is usually found we have these words:—

“*Reperitur in fine statutorum Judaeorum ea que hic esse deberent. E pur co ke la commune, &c., cum duobus † capitulis subsequentibus*” (f. 58, r<sup>o</sup>).

On referring back to the Statute of Jewry (f. 53, r<sup>o</sup>) we find at the end of it the *Districciones Scaccarii* under the words *De Tortonuses Destresces* (f. 53, v<sup>o</sup>). Secondly, in the codex Harleian MS., 746 (f. 98, v<sup>o</sup>), we have most of the Statutes of the reign of Henry III., and two of the reign of Edward I. The first of these is the Statute of Westminster I., at the end of which are these words: *Expliciunt prima statuta Edwardi Regis*. It is immediately followed by the Statute of Jewry, which is introduced by the words *Incipiunt Secunda*; in a later hand, ‡ the words *Statuta Edwardi primi de Judaismo* have been added. The Statute, as here written, contains the four chapters known as the *Districciones Scaccarii*; they are not separated by any title, but form part of the text of the instrument. This codex does not contain the Statute of the Exchequer.

Thirdly, the codex Lansdowne MS., 564, contains the Statute of Westminster I., at the end of which are the words: *Expliciunt statuta Regis Edwardi prima*. This is followed by the words:—

“*Incipiunt statuta de Judeisimo anno regni Regis eiusdem tercio apud Westmonasterium per consilium prelatorum & procerum concessa cum subsidio quintedecime*” (f. 87, r<sup>o</sup>).

At the end of the Statute of Jewry, but as part of the same statute, is written the *Districciones Scaccarii* under

\* And several other Statutes; the last being the Statute of Gloucester.

† They are usually written as 4, not 2, chapters.

‡ A fourteenth century hand, I think.

the marginal heading *De Districcionibus Iniustis Per Vicecomites Factis* (f. 88, v<sup>o</sup>). The text concludes with the words *Expliciunt statuta de Judeismo* (f. 88, v<sup>o</sup>).

The fact that the *Districciones Scaccarii* sometimes form part of the Statute of Exchequer, and at other times part of the Statute of Jewry, shews that it was enacted by the same Parliament as these Statutes; while the introductory and concluding words just noticed afford a strong presumption that it was enacted after the Statute of Jewry and before the Statute of the Exchequer.

The codex Harleian 746 is, apart from the *Districciones Scaccarii*, of some importance. Besides containing a *Glanville* and a *Registrum Brevium* of the reign of Henry III., it has a copy of the Provisions of Merton (f. 69, r<sup>o</sup>) which differs considerably from the form in the Statutes of the Realm. As printed there they contain ten\* chapters. The first five of them are undoubtedly part of the original Provisions; they are mentioned in a writ ordering the Sheriffs to cause them to be read in the county courts; and the writ is enrolled upon the Close Roll.† The seventh chapter is undoubtedly not part of the original Provisions;‡ it is a piece of legislation of the twenty-first year of Henry III., quite unconnected with them. This leaves chapters 6, 8, 9, and 10. Professor Maitland has discussed at some length the arguments for and against chapter 8 being part of the provisions, in his *Introduction to Bracton's Note Book*; on the whole, it seems that both chapters 8 and 10, which resemble one another in form, are parts of them; they are not mentioned in the writ on the Close Roll because they enacted nothing.

Now, the strongest argument in favour of the Provisions having been made in the form given in the Statutes of the

\* But in the English translation they are divided into eleven chapters.

† Close Roll, 48, M. 18, in dorso.

‡ *Vide Pat. Roll*, 46, M. 10.

Realm is that they were so written in the early collections of Statutes. The codex Harleian 746 is therefore remarkable because the text of the Provisions contained in it is not in that form. It consists of the chapters which are named as follows in the margin of the Statutes of the Realm:—

“(1) Damages to a widow on a writ of Dower.

“(2) Widows may bequeath the corn on their lands.

“(3) Usury shall not run against minors.

“(4) Punishment in case of redisseisin.

“(5) Common of pasture within great manors.

“(6) Special bastardy.

“(7) Trespassers in parks, &c.”

This text supports the contention that chapters 8 and 10 are part, and that chapters 6 and 9 are not part, of the Provisions of Merton.

In a subsequent number I hope to consider this subject further.

G. I. TURNER.

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#### IV.—CURRENT NOTES ON INTERNATIONAL LAW.

##### **Venezuela and International Arbitration.**

A most important budget of official correspondence between the British and United States Governments has just been published, viz., Parliamentary Papers, United States, No. 2, 1896 —“Correspondence between the Governments of Great Britain and the United States with respect to proposals for Arbitration.” Two questions are dealt with: (1) The Venezuelan Controversy, and (2) The proposal for a general Treaty of Arbitration between the two Powers. As regards the former of these, it is satisfactory to observe that the tone of the correspondence is at

once more amicable and dignified than recent events might have led one to anticipate. "The stumbling block in the way of prompt settlement of the boundary dispute is the legitimate desire on the part of the British Government to exclude from any submission to arbitration the "power to "include as the territory of Venezuela any territory which "was *bonâ fide* occupied by subjects of Great Britain on "January 1st, 1887, or as the territory of Great Britain "any territory which was *bonâ fide* occupied by Venezuelans "at the same date."

Mr. Olney, on behalf of the United States Government, objects that it is the *bonâ fides* of the respective Governments which is material, not that of their individual subjects. "Venezuela is not to be stripped of her rightful "possessions because the British Government has "erroneously encouraged its subjects to believe that such "possessions were British." He suggests a provision in the submission to arbitration as follows: "Provided, "however, that in fixing such line, if territory of either "party be found in the occupation of the subjects "or citizens of the other party, such weight and effect "shall be given to such occupation as reason, justice, the "rules of International Law, and the equities of the "particular case may appear to require." The matter stands thus for the present, but there is every reason to anticipate that a satisfactory result will soon be arrived at, in view of the narrowing down of the issues which has taken place.

The other and greater subject of the correspondence is of the very highest importance to the two great English-speaking nations of the world. It is impossible to adequately deal with the matter in these Notes. Suffice it to say that a definite draft scheme for general arbitration of disputes between Great Britain and the United States has actually been formulated and subjected to the most careful consideration and discussion. The Treaty, as originally

drafted by Lord Salisbury, proposes a Board of "permanent judicial officers," from whom, as occasion may arise, an arbitrator shall be selected by each State; who, with an umpire in case of disagreement, shall hear and decide the dispute in question. The chief point of difference as to the terms of the proposed Treaty lies in the fact that Lord Salisbury proposes to exclude from its scope "any difference which in the judgment of either Power materially affects its honour or the integrity of its territory," leaving such matters to special agreement in each particular case. He also proposes that as regards differences in respect to a question of fact or of International Law involving the territory, territorial rights, sovereignty, or jurisdiction of either party, or any pecuniary claim or group of claims of any kind involving "a sum larger than £100,000," either party may have an award reviewed by a specially appointed International Tribunal, and only sustainable by a majority of at least 5 to 1.

Mr. Olney joins issue on both these points, and suggests as to the former that the Treaty shall provide that such matters shall fall within the scope of the Treaty, unless, in any particular case that may arise, Parliament or Congress respectively shall resolve to withdraw them from Arbitration.

As regards the latter question, Mr. Olney suggests certain modifications; in particular, that a bare majority of the appellate Tribunal may finally settle the case.

The negotiations are still pending and there appears to be a further tendency towards mutual concessions on the points at issue.

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### *Private International Law.*

#### **Foreign Wills.**

\* In the case of *In the Goods of Von Linden*, 1896, P. 148, the will of a German subject domiciled in Wurtemberg was

proved in that State in accordance with the requirements of local law and deposited with a notary, who, by the law of the country, was forbidden to allow the will to leave his custody. The testator gave his widow the unrestricted right of administration and usufruct of his estate. Part of the personal estate was in England. The Court held that probate might be granted to the widow as virtual executrix, of a copy of the original will, properly proved, limited to such time as might elapse before the original will itself should be brought in. The practice followed that adopted in the earlier case of *In the Goods of Lemme*, 1892, P. 89.

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#### Income Tax.

There are two very important recent decisions of the House of Lords upon the question as to the liability for Income Tax in respect of a trade or business carried on abroad.

In the *San Paolo (Brazilian) Railway Co., Limited v. Carter*, 1896, Ap. Cas. 31, the House of Lords, affirming the decision of the Court of Appeal, held that the appellants being a company registered under the Companies Acts, and having their registered office in England, were assessable to income tax under the First Case of Schedule D, of 5 & 6 Vict., c. 35, sect. 100, upon the full amount of the balance of the profits or gains of their business. Their Lordships found that as the appellants' business was clearly carried on *partly* in England, the present case was distinguishable from that of *Colquhoun v. Brooks*, 14 Ap. Cas. 493, where the business was wholly carried on outside the United Kingdom.

In the still more recent case of *Grainger v. Gough*, 1896, W.N., p. 54, the Lords reversed the decision of the Court of Appeal, 1895, 1 Q.B. 71, and decided that where a French merchant resident in France exercised his trade in

the United Kingdom by having an agent here to obtain and remit orders from English customers, the foreign principal did not exercise his trade in the United Kingdom within the meaning of Schedule D of the Income Tax Act, 1853, and was not assessable to income tax in the name of the appellants as his agents under sect. 41 of the Income Tax Act, 1842.

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### **Appointments by Foreign Wills.**

In *Re Huber*, *Times Reports* for 1896, p. 499; and L.R. Weekly Notes, 1896, p. 72. A testatrix, who was British born, married a Frenchman in 1859, and died in 1895 domiciled in France. By a settlement made in 1880, certain property was settled upon English trustees in trust to pay income to the testatrix for life, with remainder to her children, grandchildren, or remoter issue, as she should by deed or will appoint. In 1890, the testatrix exercised the power of appointment, by a will made in English form, and invalid by French law.

The Court, following the well-known decisions in *The Goods of Halliburton*, L.R. 1 P. and D. 90; in *The Goods of Alexander*, 29 L.J. (N.S.) P. and M. 92; and *D'Huart v. Harkness*, 34 Beav. 324, held that the appointment was effectual and the will must be admitted to probate. In connection with this subject it is worth recalling the case of *In re Harman, Lloyd v. Tardy*, 1894 (3 Ch.) 607, which has hardly received the notice which it deserves. It was the case of an English lady, domiciled in France, who had a general power of appointment over certain personalty representing a share in the proceeds of real estate in England. By her will, made in French form, she gave "all her properties and chattels" ("tous les biens et droits mobiliers") to T. absolutely. It was held by *Kekewich, J.*: that the will must be construed as disposing of everything in the form of personal estate over which the testatrix had

a power of disposition, and that the power was well exercised, and that the fund in question passed by the operation of the will to the appointee.

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### Domicil.

There have been two interesting cases recently decided dealing with this subject. *In re Dunbar, Dunbar v. Wentworth*, Times L.R., Vol. XII., p. 153, the domicil of a living person was in question under rather curious circumstances.

The action was for a declaration as to the domicil, at the date of her death, of a Mrs. Dunbar, wife of Archdeacon Dunbar; but as her domicil followed that of her husband the matter resolved itself into the determination of the latter's domicil at the date of his wife's death. The husband's domicil of origin was admittedly Scotch. He was educated in England, and ordained a clergyman of the Anglican Church. He undertook parochial duty in a number of English parishes, and between 1875 and 1877 he officiated as Archdeacon of Grenada. In 1879, his wife unsuccessfully instituted proceedings for judicial separation, and subsequently there was a voluntary separation. The wife died abroad in 1891. The Archdeacon himself gave evidence of his own intention to retain his Scotch domicil. *Romer, J.*, held that, having regard to all the circumstances, the husband's domicil at the date of his wife's death was Scotch. He was more or less of a rolling-stone, and had never settled in England or elsewhere in such a way as to lose his domicil of origin. His Lordship laid great stress on the fact of the probability of the Archdeacon succeeding to the family estates in Scotland, and the fact that after the separation, his only child had been brought up at the Scotch family seat.

The question of the effect of foreign military service on domicil arose in the later case of *In re Smith, Deceased*,



*Times L.R.*, Vol. XII., p. 223. The deceased was by birth a Scotchman. In 1853, at the age of 18, he left his home and enlisted in the army. He served through the Indian Mutiny and afterwards in various parts of the United Kingdom. In 1879, when he was stationed in Ireland, he came over to England and married a domiciled Englishwoman, who subsequently joined him in Ireland. In 1884 he took his discharge with a pension, and immediately afterwards took a civilian appointment as canteen steward to the 15th Hussars, then stationed at Hounslow. He accompanied that regiment to Scotland and Ireland, and died in 1895 in barracks at Dublin. *Chitty*, J., held that during the deceased's military service with the army his domicile of origin was not affected, and that subsequent to his discharge there was no sufficient evidence of an intention to change it, nor of any change in fact.

JOHN M. GOVER.

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## V.—NOTES ON RECENT CASES (ENGLISH).

### Liabilities of Holders of "Fully Paid" Shares.

A SUM of money, amounting to £1,600, was advanced to a company upon the security of acceptances of the company and a deposit of £16,000 "fully paid" preference shares. On the face of the certificate of the shares they appeared to be fully paid, but they had really never been paid up in cash nor had any contracts been filed under which they could be validly issued as fully paid. On the company going into liquidation, the lender of the money was placed on the list of contributories, but now asked the Divisional Court to remove his name on the ground of fraud. The Court, however, held that the lender of the

money had become a member of the company of his own consent, and his name was properly placed on the register. The applicant or lender must have been well aware that the 16,000 shares were not actually paid up, and that he was the allottee of these shares of his own consent. The application for the removal of the name in this case, *In re the Veuve Monnier Co., Limited*, was therefore dismissed. It has been suggested that such a decision as this should lead to the abolition of sect. 25 of the Companies Act of 1867, which provided that, *prima facie*, all shares subscribed for should be paid in cash, but if the provisions of the section are complied with, they may be paid for in money's worth. Every issued share of a limited company governed by the Companies Act must, therefore, be held subject to the payment of its nominal amount in cash unless otherwise determined by a contract duly made in writing and filed with the Registrar of joint stock companies, at or before the issue of such shares. The object of the section was to prevent any secret distribution of shares in return for an inadequate consideration, but any *bona fide* consideration for shares would be good. The section, though aimed at vendors and allottees, has pressed more severely on third persons who may be more innocent, and if the case of *Re Monnier* is to be taken as sound, the lender has to pay on the value of the shares in full as well as lose his loan. The reason for the decision *In re Veuve Monnier* is that the lender was considered to have constructive notice that the shares were not paid up in cash, and the company or its allottee had omitted to register the contract on allotment. This case has been taken to the Court of Appeal, where the Court considered that the lender had such information as would lead a reasonable man to enquire and know that the shares were not fully paid, and, therefore, he must be on the list of contributories for the full amount.

**Executors and Dividends.**

A tenant for life had died in 1894, and at her death was entitled to the income on certain shares. Early in 1895 these shares were sold cum dividend; later on in 1895, the dividend for the year 1894 was declared. The tenant for life's representative was not, it was held, under ordinary circumstances entitled to any allowance out of the increase in price occasioned by the sale cum dividend. Under the particular terms of the will such an allowance could be made because the will directed the trustees to transfer the shares themselves to the residuary legatees. Such was the decision in *Bulkeley v. Stephens* in the Chancery Division. In his judgment (L.R. [1896] 2 Ch., p. 241), Justice Stirling declared that a trustee who changed investments between the declaration of dividends was not bound to allow the person entitled to income any proportionate part of the price nor to charge him anything on the ground that the price was fixed in relation to the dividend. Where a tenant for life dies in the middle of the year, and the dividend is declared for that year after the stock has been sold cum dividend, the life tenant's estate is not entitled to anything of the purchase-money, which is capital.

During the hearing of the case attention was drawn to the decision in *Scholefield v. Redfern* (2 Dr. & Sm. 173), in which case Vice-Chancellor Kinderly had said there was another question of a peculiar kind, and one which was novel to him. Suppose, said he, part of the testator's property consisted of certain American stock bearing interest on dividends payable at half-yearly periods, say, January and July, and the trustees sell it in order to invest the proceeds in Consols, if they sell it at any other time than precisely the period at which a dividend has just occurred, the money realised by the sale is so much more in proportion to the time which has elapsed since the last dividend day. Therefore, the amount realised by the

sale is compounded partly of the value of the stock itself, and partly of the value of that proportionate part of the current half-year's dividend which may be considered to have accrued since the last dividend day. It is contended that the tenant for life ought to have this latter portion as income. Now, it is certain that in the multitude of cases of administration of estates in modern times where similar directions have been given by testators, the Court has never been in the habit of administering any such equity. When we consider a little further, it is obvious that if the tenant for life is to have something out of the sale money as representing income, then when the trustees invest the money, unless they invest it on the very day on which the dividend has just accrued due, the same equity ought to be administered the other way, and we ought to take from the tenant for life something of his next dividend on the Consols and add that to the capital in order to make things equal as between him and the remainderman. It is clear that if there is an equity one way there is an equity the other way. It is obvious that the reason why such equity on either side has never been administered habitually by this Court is that by attempting it a grievous burden would be imposed upon the estates of testators by reason of the complex investigation which it would lead to. The gain to either party would be far more than compensated by the expense which might be incurred in a complicated case, and for that reason no doubt the thing has never been done. I will not be the first to introduce the practice. Similar reasoning was to be found in another case, that of *Newman v. Whitbread* (1 Eq. 266). Discussing these cases in *Bulkeley v. Stephens*, Mr. Justice Stirling pointed out that the question he had to decide here was, whether the legal personal representative of the tenant for life was entitled to insist on an equity of a similar nature to that which the Vice-Chancellor declined to enforce in

the case before him. The reasons given by the Vice-Chancellor were two: first, the absence of any practice giving effect to the equity alleged; secondly, the great burden which the introduction of the practice would cost on trust properties. The first of these reasons seem applicable to the present case. As to the second of the Vice-Chancellor's reasons, the burden certainly did not appear so great as on a change of investments: first, because the alleged right would arise both on the sale of the original investment sold and on the re-investment, whereas here, it affected the sale only; and secondly, because changes of investment might take place often, whereas a sale for the purpose of distribution must take place only once for all. What the legal personal representative of the tenant for life ought to receive was so much of the purchase money as represented the value of the proportionate part of the dividend. As to how the value was to be ascertained, it should be determined by means of the evidence of stockbrokers as to the price at which the stock could have been sold at the actual time of the sale ex-dividend, the difference between this and the actual price being treated as the value of the dividend.

The application of the trustee of the estate of the late W. Lyne Stephens, asking that he might be at liberty out of funds in his hand, representing income of the testator's residuary estate, to pay to the legal personal representative of the late Mrs. Lyne Stephens, who was tenant for life of the testator's residuary estate, a proportionate part of certain dividends upon corporation stock, was therefore granted. The Royal Exchange Assurance Association, which was concerned here, was a public company within the meaning of sect. 5 of the Apportionment Act, 1870, and the interim dividend payable to the trustee of the testator's will, previously to the sale of the stock, was apportionable under that Act, and a proper share of such interim dividend ought

to be paid to the legal personal representative of the tenant for life.

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### **The Intervention of the Queen's Proctor.**

It is an anomaly of the Divorce Laws that when both married parties have infringed the marriage contract no dissolution of the marriage can be obtained, and the Queen's Proctor is charged with the duty of intervention whenever he has reason to suspect double guilt, as he is also whenever he suspects collusion. Further, if after the decree *nisi* the petitioner should commit himself wrongly during the period of six months, or, indeed until the decree is made absolute, the Queen's Proctor may intervene in "collusion" with the respondent to quash the entire proceedings. In the case of *Poole v. Poole* in the Probate Divorce and Admiralty Division, where the Queen's Proctor had intervened to prevent a decree *nisi* being made absolute, it was contended that the Proctor's intervention was too late, as more than six months had elapsed since the divorce was granted, and no collusion had been pleaded, and anything that had happened had been condoned. Mr. Justice Barnes has, however, held that the Queen's Proctor could intervene at any time before decree was absolute, and condonation was no answer between the petitioner and the Queen's Proctor. The decree was accordingly rescinded and the petition dismissed. The Court, it will be seen, therefore refused to accept the petitioner's plea, and the marriage tie still continues. The decision must be taken as correct. The Queen's Proctor has no right to intervene when once the decree absolute has been pronounced.

This step, for good or ill, justly or unjustly, has completely dissolved the marriage, and after it no person will be heard to shew that it was wrongly granted, and no application will be entertained to recall it, whatever the evidence that can be brought forward. But if, before decree

absolute—even though only a few minutes before the time appointed for the pronouncing—the Queen's Proctor alleges that he wishes for an opportunity of considering whether he shall intervene or not, that opportunity the Court will grant. It will withhold for any reasonable and necessary time the final word. An inequality in connection with divorce proceedings which the Court ought to redress is that in a successful intervention by the Queen's Proctor in a case where both parties are wrong, the woman is left at very great disadvantages as regards the man. By the traditional or unwritten law of the country a man is not bound to contribute in any way as regards the support of a wife who has behaved wrongly.

The two parties leave the Court on unequal terms, as no distinction is made as regards the man, whereas in the case of the woman, she has lost her means of support, as the man is under no obligation to assist her. It may be noticed here that the new German Civil Code, which is to come into operation with the twentieth century, renders incurable insanity legal ground for divorce.

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#### **The Liabilities of Auditors.**

The certificate of an auditor to the published accounts of a company does not necessarily mean that those accounts are absolutely true. Neither does it follow that because it can be proved that the accounts certified by an auditor are not true that the auditor has been guilty of negligence. It is no part of an auditor's ordinary duty to take stock, but the shareholders nevertheless may pass a resolution that the auditor shall certify the amount of their stock in trade. Such a resolution would involve the employment of a properly qualified valuer by the auditor, and it would be preferable for the company to have an independent one rather than rely on the expense of one

provided by the auditor. An auditor is primarily required to examine the accounts laid before him and to certify them at the same time, not being too suspicious in the course of the auditing. An auditor is not bound to be suspicious as distinguished from being reasonably careful. Unless it can be shewn that auditors do not chose to go behind the valuation of a managing director because they knew that if they had gone behind the valuation they would have found a discrepancy, they cannot be said to be guilty of misfeasance in the discharge of their duties. This case of *Re Kingston Cotton Mills*, referred to in the *Law Magazine and Review* of February last, was an appeal to the Court of Appeal from an order of the Divisional Court, which found that the auditors were liable for the payment of certain dividends on preference shares, and that they had been guilty of misfeasance and did not use proper skill and care in auditing the company's books. This was an appeal under sect. 10 of the Companies Winding-up Act of 1890, ordering the auditors to pay certain sums of money. The appeal was based on two grounds. There were two questions in dispute. Firstly, what was a misfeasance within the meaning of the Act? and, secondly, did the auditors under the circumstances of this case commit a misfeasance? There was no authority for saying that the section did not apply in the case of an officer who had committed a breach of trust. On this point the appellant was not entitled to succeed. The real question was whether the appellant had been guilty of a breach of duty. The duties of an auditor had been carefully considered, and had been laid down in the case of the *London and General Bank*. Their duties did not go beyond examining the books and ascertaining what was the right and proper financial position of the company and preparing a balance sheet to shew it. When this was considered the question arose as to what was a reasonable



amount of care and skill on the part of the auditors under the circumstances of this case. An auditor was not to be always suspicious as distinguished from reasonable care. The articles of association provided especially for the duties of an auditor. There was no charge of dishonesty against them, but it was said that they were culpably careless. For several years it appeared there were frauds committed by the manager, who, during the years 1890-1-2 and -3, kept no book or account to check the stock, and in order that he might shew a fictitious dividend he assessed the stock of yarn and cotton at much above its value. This particular item was placed on the balance sheet by the auditors as per manager's certificate. According to the Articles of Association they did not examine further than the manager's certificate into the accuracy of that statement, and they had no reason to doubt the correctness of that item. It was not a part of their duty to take stock. In this case the auditors had relied on the manager. It was further said that the auditors should not have done what they did do, and that if the books had been prepared by the auditors the stock would have been much less; but these auditors had not been wanting in reasonable care. It was not sufficient to say that the faults must have been detected. The auditors' duties were not so onerous as the learned judge had said they were, and the result followed in the dismissal of the appeal.

T. F. UTTLEY.

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## Books Received.

*The Law of Nature and Nations in Scotland.* By William Galbraith Miller, M.A., LL.B., Advocate. William Green & Sons, Edinburgh, 1896.

*The Duties and Liabilities of Trustees.* By Augustine Birrell, M.P., Q.C. Macmillan & Co., Ltd., London and New York, 1896.

*A Short History of Solicitors.* By Edmund B. V. Christian, LL.B. Reeves and Turner, London, 1896.

*The Rules of the Law Society of Newfoundland, with the Law Society Acts.* W. H. Bowden & Co., St. John's, 1896.

*The Law of Sports.* By W. M. Thompson, and J. D. A. Johnson, LL.D., Barristers-at-Law. W. B. Hearnden, London, 1896.

*Limites con Chile. Articulos del Doctor Irigoyen.* By A. B. Carranza. Juan A. Alsina, Buenos Aires, 1895.

*La Cuestion de Limites.* By Osvaldo Magnasco. Félix Lajouane, Buenos Aires, 1896.

*The Law of Negotiable Securities.* By William Willis, Q.C. Stevens and Haynes, London, 1896.

*The Law of the Domestic Relations.* By William Pinder Eversley, B.C.L., M.A. Second Edition. Stevens and Haynes, London, 1896.

*Notions Essentielles sur la Croix-Rouge.* By Gustave Moynier. Georg and Co., Geneva, 1896.

*Report of the Proceedings in the Case of Ramsey v. Massiah.* By G. Hallam Croney. In three Parts. Barbadoes, W.I.

*Copyhold Enfranchisement.* By Arthur Draycott. Effingham Wilson, Royal Exchange, London.

*A First Book of Jurisprudence.* By Sir Frederick Pollock, Bart. Macmillan and Co., Ltd., London and New York, 1896.

*A Preliminary Treatise on Evidence at the Common Law, Part I.* By James Bradley Thayer, Weld Professor of Law at Harvard University. Little, Brown, and Co., Boston, 1896.

## Reviews.

*The Law of the Domestic Relations. Including Husband and Wife; Parent and Child; Guardian and Ward; Infants; and Master and Servant.* By WILLIAM PINDER EVERSLEY, B.C.L., M.A., of the Inner Temple, Barrister-at-Law. Second Edition. London: Stevens and Haynes. 1896.

It is now eleven years since Mr. Eversley compiled the first edition of this valuable work, and we are therefore pleased to note the advent of this the second edition, which incorporates a

large amount of case law decided in the interval. At the time of the first edition, the important legislation known as the Married Women's Property Act, 1882, had been but little interpreted by our courts of law, and has since been strengthened by the Married Women's Property Act, 1893, involving important changes in that branch of legislation. The law of Parent and Child has been considerably changed by the valuable Act of 1886; while the Poor Law Act, 1889, and the Custody of Children Act, 1891, and the Summary Jurisdiction (Married Women) Act, 1895, cause new questions to arise, and the changes effected by these Statutes should be adequately explained. The Criminal Law Amendment Act, 1885, passed for the protection of young girls, and the Shop Hours Act, 1892, have also improved the Criminal Law. It is therefore apparent, that a work which deals succinctly and exhaustively with the new legislation, while explaining and defining the limits of older legislation on the subjects treated of therein, must be of no small advantage to the practitioner as well as to the student. A careful examination of this book, extending into something like 900 pages, persuades us that it may be relied on, by the lawyer, as a trustworthy and erudite guide to the various matters contained in it. It is bound to take its place as a first class text-book.

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*A Short History of Solicitors.* By EDMUND B. V. CHRISTIAN, LL.B. London: Reeves and Turner. 1896.

This work gives us the early history of attorneys from the earliest stages of our legal history to the present day. An attorney was a man appointed by a friend, by an abbot, by a bishop, by a baron, or even by the King himself, to represent the litigant. He was appointed "*ad lucrandum vel perdendum*" to win or lose, for better or worse. The attorney, however, had nothing to say to the "countor," or serjeant, the advocate of those days, now represented by the barrister. The name "attorney" fell into such disrepute, that advantage was taken of the passing of the Judicature Act, 1873, to abolish the title. Hence, all such are now called—certainly less correctly, but more stylishly—solicitors. The book is full of interest; and the lover of archæology, as well as the student of legal history, will find that there is much information to be gleaned from this unpretending but erudite little book.

*The Law of Nature and Nations in Scotland, being Lectures delivered in Session 1895-96 in the University of Glasgow.* By WILLIAM GALBRAITH MILLER, M.A., LL.B., Advocate. Edinburgh: William Green & Sons. 1896.

The author of this book was appointed to lecture on the above subject at Glasgow when the revival of legal studies took place in 1878. He divided his course into (1) Philosophy of Law, (2) The Law of Nations, systematically treated, (3) The History of the Law of Nations, and (4) Private International Law. It is the cream of these Lectures which constitutes the present book. We do not find that Mr. Miller has propounded any new doctrine on the above subjects; he has wisely contented himself with drawing his ideas from existing works, and has very successfully done so. We regret nevertheless to find that he still adheres to that barbarous compound word, "Private International Law," justifying his adherence to it because Dr. De Bar had already done so, although he (Mr. Miller) admits that it is incorrect. This should not be; two wrongs do not make a right, and it is not in the best interests of Jurisprudence to continue false epithets; the misnomer has already been condemned both by Holland and by Halleck. Nor does our author appear to be acquainted with these writers. Nevertheless the student of the Law of Nations, may peruse this concise treatise with advantage, and with much profit to himself.

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*The Duties and Liabilities of Trustees. Six Lectures delivered in the Inner Temple during the Hilary Sitzings, 1896, at the request of the Council of Legal Education.* By AUGUSTINE BIRRELL, M.P., Q.C. London and New York: Macmillan & Co. 1896.

This little book, as its title informs us, is a print of Lectures already delivered. The lecturer and writer has endeavoured to bring out in bold relief the duties and liabilities of trustees. We think he has succeeded admirably in his task, and we confidently recommend the book to all persons who have undertaken, or are about to undertake, the office of trustee. It may save many a law-suit.

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*The Law of Negotiable Securities. Six Lectures delivered at the request of the Council of Legal Education.* By WILLIAM WILLIS, Q.C. London: Stevens and Haynes. 1896.

Half-a-dozen lectures on negotiable securities, illustrated with forms of Bills of Exchange and Promissory Notes, com-

prise this volume of 185 pages. The Law of Bills of Exchange and Promissory Notes has been so well digested by the Bills of Exchange Act, 1882, that it ought not to have been a difficult matter to compile the treatise before us; the two negotiable instruments above mentioned being in fact the only instruments treated of at any length, although an attempt is made in the second chapter to enumerate all instruments which are negotiable. As a text-book for students the work is well done, and is likely to prove acceptable to them. But who is the book by? We notice far too many names of barristers who have assisted the compiler. Thus we have Mr. Arthur Cohen, Q.C., Mr. Julian Robins, Mr. Joseph Hurst, Mr. George Henry Mallinson, and Mr. Patrick Thomas Blackwell, in fact the author seems to have been afraid of his own utterances unless supported by the opinions of erudite friends. In a large work this might have been excusable or indeed necessary, but on a threadworn subject like Bills of Exchange and Promissory Notes, summarized in a little book, it betokens weakness. However this does not detract from the value of the treatise itself, as a readable handbook for students.

*Limites con Chile. Artículos del Doctor Irigoyen.* By ARTURO B. CARRANZA. Buenos Aires: Juan A. Alsina. 1895.

*La Cuestion de Limites. El Alegato Chileno (Refutacion).* By OSVALDO MAGNASCO. Buenos Aires: Felix Lajouane. 1896.

The question treated in these two controversial works is one of some interest to international lawyers. It has been pending between Chile and the Argentine Republic ever since 1857. Chile asserts that the watershed (*divortium aquarum*) of the Andes is the natural boundary between the Republics; the Argentine contention is that the line is to be drawn along the highest peaks of the Cordilleras. Both works, as will be obvious from the place of their publication, strongly support the Argentine view in opposition to the Chilian view as recently set forth by Señor Barros Arana in *El Fenocanil*, a Santiago periodical. The authors seem to make their case pretty clear. It is based on the opinion of text-writers (Phillimore and Hall being cited among others) and on numerous State papers, beginning with the charter of Charles II. of Spain in 1684, under which *La Gran Cordillera Nevada* was to be the boundary between Chile and the provinces of the Rio de la Plata. Both works are well and temperately written, and give the reader a high idea of the industry and ability of Argentine publicists.

# Quarterly Digest.

BY

THOMAS J. BARNES, OF THE MIDDLE TEMPLE,  
BARRISTER-AT-LAW.

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# Quarterly Digest

OF

## ALL REPORTED CASES,

IN THE

**Law Times** FOR APRIL AND PART OF MAY, 1896,

AND THE CHIEF CASES IN THE

**Law Reports** DURING THE SAME PERIOD.

By THOMAS J. BARNES, of the Middle Temple,  
Barrister-at-Law.

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### Administration:—

- (i.) **Ch. D.**—*Estate Duty—Settlement Estate Duty—Finance Act, 1894, ss. 1, 5, 6, 8, 9, 14, 22.*—A testator left legacies in trust for beneficiaries for their lives and then to their children respectively. The residue, which was all personalty, he divided into parts, some of which were settled on trusts for beneficiaries for life, and then to their children, and some on trust for beneficiaries absolutely. *Held*, that the whole of estate duty and settlement estate duty was payable out of the unsettled residuary estate.—*In re Webber (deceased)*; *Gribble v. Webber*, L.R. [1896] 1 Ch. 914; 74 L.T. 244.
- (ii.) **C. A.**—*Money Lent to Continuing Firm—Costs of Auditing—Life Tenant and Remainderman.*—Where a testator left in trust to persons for life, with remainders over, money which he had lent without security to a firm from which he had retired, who were to produce to him an annual balance sheet and to permit his audit, it was *held*, that the number of audits were in the discretion of the trustees, and that as the audits were for the safety of the corpus, their cost should be paid out of capital.—*In re Bennett*; *Jones v. Bennett*, 74 L.T. 157; L.R. [1896] 1 Ch. 778.
- (iii.) **C. D.**—*Executor—Surety—Retainer.*—An executor's right of retainer to meet a promissory note in which he has joined the testator as surety for him is not impaired by the executor's claim not having been made till after the chief clerk's certificate is filed in a creditor's administration action.—*In re Giles*; *Jones v. Pennefather*, L.R. [1896] 1 Ch. 956; 74 L.T. 21.
- (iv.) **Ch. D.**—*Appropriation of Assets.*—A distribution of specific assets under a bequest to some persons absolutely and to others in trust, need not necessarily be made by the trustees to all the beneficiaries simultaneously, even though some of them receive their proportion at a period when the market value is higher than rules when the portions of the other beneficiaries are appropriated.—*In re Richardson*; *Morgan v. Richardson*, L.R. [1896] 1 Ch. 512; 74 L.T. 12.

**Adulteration:—**

- (i.) **Q. B. D.**—*False Warranty—Time for Taking Proceedings—Food and Drugs Act, 1875—Amendment Act, 1879.*—A summons under sect. 10 of the Amendment Act need not be served on the original vendor within 28 days of the purchase for test purposes, if the purchase is made from a retailer who sells under his warranty.—*Cook v. White*, L.R. [1896] 1 Q.B. 284; 74 L.T. 53.
- (ii.) **Q. B. D.**—*Certificate of Analyst—Evidence—Food and Drugs Act, 1875, s. 21.*—The analyst's certificate under sect. 21 of the Act is not conclusive evidence if the defendant or his wife is tendered as a witness.—*Hewitt v. Taylor*, L.R. [1896] 1 Q.B. 287; 74 L.T. 51.

**Bankruptcy:—**

- (iii.) **Q. B. D.**—*Undischarged Bankrupt—After-acquired Property—What Part of Personal Earnings the Bankrupt may Retain.*—All the personal earnings of an undischarged bankrupt beyond the sum necessary for the maintenance of himself and his family pass to the trustee.—*In re Graydon; c. p. the Official Receiver*, L.R. [1896] 1 Q.B. 417; 74 L.T. 175.
- (iv.) **C. A.**—*Bankruptcy Act, 1883, s. 7, sub-s. 3—"Sufficient Cause" for Dismissal of Petition.*—That there are no assets is not "sufficient cause" within sect. 7 for the dismissal of a bankruptcy petition.—*In re Leonard; c. p. Leonard*, L.R. [1896] 1 Q.B. 473; 74 L.T. 183.
- (v.) **Q. B. D.**—*Bankrupt's Property Abroad—Refusal to Sign Power of Attorney—Committal—Bankruptcy Act, 1883, ss. 24, 168.*—A bankrupt who refuses to sign a power of attorney to enable the trustee to sell, at a fair price, land situate in a foreign country, is liable to committal.—*In re Harris*, 74 L.T. 221.
- (vi.) **Ch. D.**—*Bankruptcy Act, 1883, s. 38—Judicature Act, 1875, s. 10—Winding-up—Set off—Money intended for specific purpose—Mutual Dealings.*—A balance remaining in the hands of solicitors out of money handed to them for a specific purpose which has been accomplished, cannot on the bankruptcy of their client be set off by them under sect. 38 of the Bankruptcy Act, 1883, in the absence of consent on his part before his bankruptcy or of a determination of the bailment. Mutuality must be an essential of any case in order to bring it within sect. 38.—*In re Mid-Kent Fruit Co., Limited*, L.R. [1896] 1 Ch. 567; 74 L.T. 22.
- (vii.) **C. A.**—*Award—"Civil Proceeding"—Arbitration Act, 1889, s. 12—Bankruptcy Act, 1890, s. 1.*—An order to enforce an award under sect. 12 of the Arbitration Act is a "civil proceeding" within sect. 1 of Bankruptcy Act.—*E. p. the Caucasian Trading Corporation, Limited; in re a Bankruptcy Petition*, L.R. [1896] 1 Q.B. 368; 74 L.T. 47.
- (viii.) **C. A.**—*Transaction with Bankrupt for Valuable Consideration—Bankruptcy Act, 1883, s. 49.*—A transaction which is an act of bankruptcy is not invalid if it took place for valuable consideration before the date of the receiving order and without notice.—*Shears and Another v. Goddard*, L.R. [1896] 1 Q.B. 406; 74 L.T. 128.
- (ix.) **Q. B. D.**—*Protected Transaction—Bankruptcy Act, 1883, s. 49.*—A debtor assigned all monies due or becoming due to him, under a contract, to a finance company, and later he gave a second assignment on the same contract to the same company. Subsequently a receiving order was made against the debtor for an act of bankruptcy committed between the dates of the two assignments. The company then gave notice of both their deeds to the trustee. *Held*, that the company had no notice of the bankruptcy when they gave notice to the trustee, that this notice was within sect. 49, and that the company were entitled to

be paid out of money received on account of the contract.—*In re Seaman : e. p. The Furness Finance Co., Limited*, L.R. [1896] 1 Q.B. 412; 74 L.T. 161.

### Building Society:—

- (1.) *Instrument of Dissolution—Signatures of Infants, Agents and Joint Holders—Building Societies Act, 1874, ss. 17, 32, 38, 39.*—The registered instrument for dissolving a building society incorporated under the Act being irregular, it was held that every person signing assented as to all his shares; that authorised agents and infants could sign; that signatures of one joint holder on behalf of his co-holders, and signatures appended after registration must be excluded; and that if after ratification the signatures were less than three-fourths of the number of members, the instrument of dissolution was invalid.—*Dennison v. Jeffs*, L.R. [1896] 1 Ch. 611; 74 L.T. 270.

### Burial Ground:—

- (ii.) *Ch. D.—Disused Burial Grounds Act, 1884, s. 5—Sale of Land under 57 Geo. III., c. 29, ss. 80 and 81.*—A sale to the Commissioners of Sewers, under 57 Geo. III., c. 29, of land, which had formed part of a churchyard, was held to fall within the exception of sect. 5 of the Disused Burial Grounds Act, 1884, though made after the passing of the Act.—*Attorney-General v. Trustees of London Parochial Charities*, L.R. [1896] 1 Ch. 541; 74 L.T. 184.

### Charity:—

- (iii.) *C. A.—Charity Established by Deed—Sale of Land—Consent of Charity Commissioners Necessary—Charitable Trusts Amendment Act, 1855, s. 29.*—A charity founded by deed enrolled under 9 Geo. II., c. 36, is not "a scheme legally established" under sect. 29 of C. T. A. Act, 1855, and though the deed contain powers of sale, the trustees cannot part with land without the consent of the Charity Commissioners.—*In re Mason's Orphanage and the London and North-Western Railway Co.*, L.R. [1896] 1 Ch. 596; 74 L.T. 161.
- (iv.) *Ch. D.—Endowed Schools Act, 1869, s. 14—Jurisdiction of Court.*—The Court will not sanction a scheme for dealing with educational endowments falling within sect. 14 of the E. S. Act if it is opposed by the governing body.—*Attorney-General v. Christ's Hospital*, 74 L.T. 96.
- (v.) *Ch. D.—Will—Construction.*—A bequest of money for charitable or "philanthropic" purposes will not be supported.—*In re Macduff; Macduff v. Macduff*, 74 L.T. 187.

### Church Land:—

- (vi.) *Ch. D.—3 Geo. IV., c. 72, s. 33—3 & 4 Vict., c. 60, s. 19—Church Land Unconsecrated Taken under Lands Clauses Act—Appropriation of Purchase Money—Ecclesiastical Commissioners.*—The Ecclesiastical Commissioners were held to have acted within their powers under the Church Building Acts in directing that money, paid on compulsory sale under the Lands Clauses Act of land conveyed for the site of a church, but not consecrated with the building, should be applied part to the discharge of a mortgage on the living to Queen Anne's bounty and part to structural repairs of the church.—*E. p. the Vicar of Christ Church, East Greenwich*, L.R. [1896] 1 Ch. 520; 74 L.T. 18.

**Colonial Law:—**

- (i.) **P. C.**—*Law of Western Australia*—O. 36, r. 10—*Jurisdiction*.—Order 36, rule 10, of the Court of Western Australia (which is identical with order 20, rule 10, of the rules of the Supreme Court in England) does not enable the Court, in setting aside findings of a jury which have been objected to, to set aside other findings to which no objection has been made.—*Ogilvie v. West Australian Mortgage and Agency Corporation*, L.R. [1896] A.C. 257; 74 L.T. 201.
- (ii.) **P. C.**—*Nova Scotia—Revised Statutes, 5th Series, cap. VII.—Renewal of Licence to work Mines*.—The appellant held a Government licence to work coal in Nova Scotia for two years. By sect. 95 of cap. VII. he would have been entitled to an extension for a year. But before his term had expired, sect. 95 was repealed and leases were substituted for licenses. *Held*, that his right to an extended licence was taken away.—*Reynolds v. Attorney-General of Nova Scotia and Others*, L.R. [1896] A.C. 240; 74 L.T. 108.
- (iii.) **P. C.**—*Appeal—Royal Prerogative—Law of Tasmania—Act No. 10 of 1858*.—The Royal prerogative of granting appeals from a colonial court does not apply where the Court is, by Act of the local legislature, to be guided by equity but not by strict rules of law.—*Moses v. Parker*, L.R. [1896] A.C. 245; 74 L.T. 112.
- (iv.) **P. C.**—*Queensland—Insurance*.—Insurers who have paid in good faith have the remedies which were open to the insured, and on suing in their own name a person who has caused the loss, cannot be met by the plea that they might have successfully contested their liability under the policy.—*King v. Victoria Insurance Co.*, L.R. [1896] A.C. 250; 74 L.T. 206.
- (v.) **P. C.**—*New South Wales—Evidence—Non-suit*.—The judge may direct a non-suit, when the jury cannot, on the evidence, reasonably give a verdict for the plaintiff.—*Hiddle & Co. v. National Fire and Marine Insurance Co. of New Zealand*, 74 L.T. 204.

**Company:—**

- (vi.) **Ch. D.**—*Prospectus—Omission of Facts—Rescission of Contract*.—A person who applies for shares in a company on statements in a prospectus which contains no positive misrepresentations is not entitled to a rescission of his contract to take shares which are allotted to him because of the non-disclosure of some facts, unless the omissions are misleading.—*McKeown v. Boudard Peveril Gear Co., Limited*, 74 L.T. 310.
- (vii.) **Q. B. D.**—*Directors Acting after Expiry of Term—Consequences—Companies Act, 1862, s. 67*.—Where directors knowing their term of office has expired, and that they have not been re-elected, continue to perform the duties of directors, they do not come within the protection of sect. 67 of the Companies Act, and a person who has paid money to them is not estopped by the fact that he was aware of their real position.—*Tyne Mutual Steamship Insurance Association v. Peter Brown and Others*, 74 L.T. 283.
- (viii.) **C. A.**—*Companies Act, 1862—Table A, Art. 27—Deceased Shareholder—New Capital—Delay in Application*.—A limited company determined by resolution to increase its capital, and accordingly, by a subsequent resolution, new shares were created, which were to be offered to registered holders of certain other shares; and such as were not accepted within a prescribed time were to be at the allotment of the directors. Between the dates of the two resolutions a shareholder died. His name remained as a registered holder, but no notice of the new issue was sent to his registered address or to his representatives,

and it was considerably after the prescribed time, but before any allotment of unclaimed shares had been made by the directors, that the executrix was able to claim a portion of the new issue. *Held*, reversing the decision of the Court below, that under the terms of the resolutions read with sect. 27 of table A, the successors in title to the qualified persons at the date of the first resolution had the option of acceptance, and that under the circumstances of the case the option could still be exercised by the executrix.—*James v. The Buena Ventura Nitrate Grounds Syndicate, Limited*, L.R. (1896) 1 Ch. 456; 74 L.T. 1.

- (i.) **Ch. D.**—*Winding-up—Sale—Unclaimed Dividends—Statute of Limitations*.—A company is not a trustee of dividends for its shareholders, and the Statute of Limitations begins to run against a shareholder, from the date fixed for the payment of his dividend.—*In re Severn and Wye and Severn Bridge Railway Co.*, L.R. [1896] 1 Ch. 559; 74 L.T. 219.
- (ii.) **Ch. D.**—*Winding-up—Practice—Misfeasance Summons—Official Receiver—Security for Costs*.—The Court will not generally order an official receiver, acting as liquidator, to give security for costs of the hearing of a misfeasance summons; but it has jurisdiction to fix the costs upon him personally.—*In re W. Powell & Sons, Limited*, L.R. [1896] 1 Ch. 681; 74 L.T. 220.
- (iii.) **H. L.**—*Winding-up—Examination of Promoter, Director, or Officer—Companies (Winding-up) Act, 1890, s. 8, sub-s. 2 and 3—Companies Act, 1862*.—The Court cannot order the public examination of any person indicated in sect. 8, sub-sect. 3 of the Winding-up Act unless the official receiver by a "further report" under sub-sect. 2 has imputed fraud in the formation or conduct of the company.—*E. p. Barnes*, L.R. [1896] A.C. 146; 74 L.T. 153.
- (iv.) **Q. B. D.**—*Company of two real Shareholders only—Individual Liability—Companies Acts*.—A company formed under the Companies Acts by two partners to limit their own liability is an effectual company, and the partners cannot be sued individually. But it is possible that on liquidation the creditors of the company might be entitled to an indemnity from the trading partners.—*Munkittrick v. Perryman and Hands*, 74 L.T. 149.
- (v.) **Ch. D.**—*Winding-up—Offer to Underwrite—Acceptance after Close of Public Subscription*.—A person offered to underwrite part of the share capital of a new company for a commission. The offer was accepted after the invitation to the public to subscribe had failed, and the subscription list had been closed. *Held*, that he was not a member of the company.—*In re Hemp, Yarn, and Cordage Co., Limited; Hindley's Case*, 74 L.T. 136.

### Copyright :—

- (vi.) **Ch. D.**—*Adaptation of Play—Material Alterations—Assignment of Partial Rights—Right of Action of Assignor—Dramatic Copyright Act (3 & 4 Wm. IV., c. 15)*.—A person who adapts a play but introduces material variations is "the author" of the new version. An author cannot, without the consent of his assignee, maintain an action for infringement of partial rights which he has assigned to another.—*Tree v. Bowkett*, 74 L.T. 77.

### Covenants :—

- (vii.) **Ch. D.**—*Auction—Restrictive Covenants—Variation—Private Treaty*.—An estate was put up to auction in lots, under sale conditions that no business was to be carried on upon it. A part of the estate called G..

left unsold at the auction, was sold privately, in lots, under condition that no trade, offensive, or in any way injurious to the other occupiers, should be carried on upon it. *Held*, that a purchaser at the auction could restrain the owner of a lot in G. from carrying on a business there; but that the owner of one lot in G. could not restrain the owner of another lot from working a laundry thereon; and that the term "injurious to the land" applied to direct injury only.—*Knight v. Simmons*, L.R. [1896] 1 Ch. 653; 74 L.T. 188.

### Criminal Law:—

- (i.) **Q. B. D.**—*A Telegram may be a Forged Instrument*—24 & 25 Vict., c. 98, s. 38.—Sending a telegram in another man's name with the object of procuring the payment of money with intent to defraud is forgery at common law, and such a telegram is a forged instrument (Lord Russell, C.J., and Williams, J., doubting) within sect. 38 of the Forgery Act, 1861.—*Reg. v. Riley*, L.R. [1896] 1 Q.B. 309; 74 L.T. 254.

### Ecclesiastical Law:—

- (ii.) **Consistory Court of London.**—*Jurisdiction—Clergy Discipline Act, 1892, rule 34—Simony—False Declaration under Clerical Subscription Act, 1865.*—A charge of simony and of knowingly making a false declaration against simony under the Clerical Subscription Act, 1865, is within the jurisdiction of the Consistory Court of London under the Clergy Discipline Act, 1892.—*Lee (office of Judge promoted by) v. Flack*, L.R. [1896] P. 138.
- (iii.) **Archbishop of Canterbury.**—*Right to Use of Pathway across closed Burial Ground—Faculty.*—Where a rector and churchwardens had under a faculty granted an exclusive right of way for a term of years across a closed churchyard, they were refused a faculty to extend the right of way to other persons before the expiry of the term.—*Rector and Churchwardens of St. Gabriel, Fenchurch Street v. City of London Real Property Co., Limited*, L.R. [1896] P. 95.

### Election:—

- (iv.) **C. A.**—*Parliament—Election Petition—Subsequent Illegal Practices.*—Illegal practices committed after the presentation, or amendment, of an election petition cannot be alleged to support it.—*In re Haggerston Election Petition; Crenser v. Lowles*, L.R. [1896] 1 Q.B. 504; 74 L.T. 42.

### Employers Liability:—

- (v.) **Q. B. D.**—*Injury to Apprentice—Measure of Damages—Employers Liability Act, 1880, s. 3.*—The compensation which an out-door apprentice can recover for personal injuries, under sect. 3 of Employers Liability Act, cannot exceed the sum which his earnings at the time of the accident would amount to in three years.—*Noel v. Redruth Foundry Co., Limited*, L.R. [1896] 1 Q.B. 453; 74 L.T. 196.

### Evidence:—

- (vi.) **Q. B. D.**—*Promissory Note insufficiently Stamped—Use in cross-examination—Stamp Act, 1891, ss. 14, 38.*—An unstamped promissory note may be handed to the maker under cross-examination to refresh his memory, and he may be bound by his admissions, notwithstanding sect. 14 (sub-sect. 4) of the Act.—*Birchall v. Bullough*, L.R. [1896] 1 Q.B. 325; 74 L.T. 27.

**Extradition:—**

- (i.) **Q. B. D.**—*Power to surrender for Falsification of Accounts (faux)—Extradition Act, 1870—Extradition Treaty with France, 1878.*—Falsification of accounts being a crime within the sect. 83 of the Larceny Act, 1861, and within sect. 1 of Falsification of Accounts Act, 1875, as well as within Art. 147 of the French Code Penal, and within sched. 1 of the Extradition Act of 1870, extradition on the charge of such a crime may be granted under clause 18 of the Extradition Treaty with France where the crime is alleged to have been committed by the accused person, in the character of director, officer, or member of a public company. —*In re Arton (No. 2)*, L.R. 1 Q.B. 509; 74 L.T. 249 [see also p. 60 ante (iii.)].

**Franchise:—**

- (ii.) **C A.**—*Parliamentary and Municipal Registration Act, 1878, s. 5—Representation of People Act, 1884, s. 3—"Part of House"—Policeman.*—The exclusive but restricted occupation in a police-station of a cubicle separated from others by a partition not reaching to the ceiling, with an atmosphere common to all, is not a part of a house occupied in a dwelling within the meaning of the Acts.—*Clutterbuck v. Taylor*, L.R. [1896] 1 Q.B. 395; 74 L.T. 177.

**Gaming:—**

- (iii.) **Q. B. D.**—*"Place" for purpose of Betting—Betting Houses Act, 1853, s. 3.*—A hoarding, supported by stays on an open piece of ground, is a "place" within sect. 3.—*Liddell v. Lofthouse*, L.R. [1896] 1 Q.B. 295; 74 L.T. 139.

**Gas Company:—**

- (iv.) **Ch D.**—*Arrears Due—Managers Appointed by Court—New Occupation—Gas Works Clauses Act, 1871, ss. 11, 39.*—Where the Court had appointed receivers and managers of the business of a company which owed money for gas, they were held to be new occupiers, entitled, without paying the arrears due by the company, to a supply of gas on entering into a contract under sect. 11 of the Gas Works Clauses Act, 1871.—*Paterson v. Gas Light and Coke Co.*, 74 L.T. 280.

**Husband and Wife:—**

- (v.) **Ch. D.**—*Legacy to Married Woman for Separate Use—Obtained by Husband—Trustee Act, 1883, sect. 8—Statute of Limitation.*—A husband who takes possession against his wife's protest of a legacy for her separate use to which she was entitled before the date of the Married Woman's Property Act is a trustee for her, and no Statute of Limitation applies.—*In re Wassell; Wassell v. Leggatt*, L.R. [1896] 1 Ch. 555; 74 L.T. 99.
- (vi.) **P. D.**—*Cruelty—Summary Jurisdiction (Married Women) Act, 1895, s. 4—Retrospective Operation.*—Sect. 4 applies to acts of persistent cruelty committed before the Act came into operation.—*Lane v. Lane*, L.R. [1896] P. 133.
- (vii.) **P. D.**—*Practice—Summary Jurisdiction (Married Women) Act, 1895, s. 11.*—The practice on appeals to the Probate, Divorce, and Admiralty Division from decisions under the Summary Jurisdiction Act, 1895, is governed by O. lix., rr. 4, 7, 8, 10, 11, 12 and 16.—*Swoffer v. Swoffer*, L.R. [1896] P. 131.



**Land Clauses Act:—**

- (i.) **C. A.**—*Elementary Education Act, 1870, ss. 19, 20—Lands Clauses Consolidation Act, 1845, s. 68—School Board—Land Acquired by Agreement—Infringement of Restrictive Covenants—Remedy.*—Restrictive covenants are released from land purchased by a school board under agreement, and the only remedy of persons whose rights are impaired is by seeking compensation under sect. 68 of the Lands Clauses Consolidation Act.—*Kirby v. The School Board for Harrogate*, L.R. [1896] 1 Ch. 487; 54 L.T. 6.

**Licensing:—**

- (ii.) **Q. B. D.**—*Beerhouse—Renewal of Licence—Wine and Beerhouse Act, 1869, ss. 8, 19.*—The licence of a beerhouse which is within sect. 19 of the Act of 1869 must be renewed without qualification, unless there is an objection under sect. 8, or unless the premises have been materially altered since the last renewal.—*Reg. v. The Justices of Bradford*, 74 L.T. 287.
- (iii.) **Q. B. D.**—*Off-licence—Order by Post-card—Appropriation at Brewery—Licensing Act, 1872, s. 3.*—An order for beer posted to the brewery is a contract made on the licensed premises, and appropriation there and delivery to the customer is not a breach of sect. 3 of the Licensing Act.—*Pletts v. Beattie*, L.R. [1896] 1 Q.B. 519; 74 L.T. 148.

**Local Government:—**

- (iv.) **Q. B. D.**—*Slaughter-house—Towns Improvement Clauses Act, 1847, s. 126—Local Government Act, 1858.*—Premises contiguous to the place of slaughter and used for processes connected with slaughtering are slaughter-houses within the terms of the Acts.—*Hides v. Littlejohn*, 74 L.T. 24.
- (v.) **Q. B. D.**—*Bye-Law—Annoyance.*—A bye-law passed by a county council under s. 16 of Local Government Act, 1888, to the effect that "no person shall in any street or public place, or on land adjacent thereto . . . use any profane or obscene language," was held unreasonable and invalid because it extended to "land adjacent" to a public place, and had no provision that the prohibited act must have caused annoyance.—*Strickland v. Hayes*, L.R. [1896] 1 Q.B. 290; 74 L.T. 137.

**Lunatic:—**

- (vi.) **C. A.**—*Property of Bankrupt Lunatic—Maintenance of Lunatic—Bankruptcy Act, 1883, s. 102, sub-s. 2, s. 104.*—The Judges in Lunacy have no jurisdiction to require the trustee in bankruptcy of a lunatic to pay money into Court for the maintenance of a lunatic.—*In re Farnham* (a person of unsound mind), No. 2 [see p. 41 ante (iv.)], L.R. [1896] 1 Ch. 836; 74 L.T. 214.

**Marriage:—**

- (vii.) **P. D.**—*Marriage on British Warship by Chaplain—No Licence or Banns—Validity.*—The marriage of two British subjects on board one of Her Majesty's ships abroad by a clergyman of the Church of England is valid.—*Culling v. Culling and Nicholson*, L.R. [1896] P. 116; 74 L.T. 252.

**Married Woman:—**

- (viii.) **C. A.**—*"Interest in Lands" under Fines and Recoveries Act, ss. 1, 77.*—The interest of a married woman beneficially entitled to money

invested on mortgage held by her trustees is an interest in land within sect. 1, and can be disposed of by her under sect. 77.—*Miller v. Collins*, L.R. [1896] 1 Ch. 573; 74 L.T. 122.

- (i.) **P. D.**—*Costs in Probate Action—Restraint on Anticipation—Caveat is not a "Proceeding" within Married Woman's Property Act.*—Property of a married woman which she is restrained from anticipating, is not liable to costs, given against her in an action to establish a will, in which she has been made a defendant, in consequence of having entered a caveat; for a caveat is not a "proceeding" within sect. 2 of the Married Woman's Property Act.—*Moran v. Place*, 74 L.T. 223.

### Metropolis:—

- (ii.) **Q. B. D.**—*Management—Sewer or Drain?—Metropolis Local Management Act, 1855, ss. 68, 250.*—A pipe which formerly carried sewage from two houses into the main drain, remains a sewer to be repaired by the vestry when it has been disconnected from one of the houses.—*Vestry of St. Leonard's, Shoreditch v. Phelan*, L.R. [1896] 1 Q.B. 533; 74 L.T. 285.
- (iii.) **C. A.**—*New Street—Building on Forecourt—Metropolis Management Act, 1862, ss. 74, 75.*—One of a row of houses in London, each having a long forecourt and rear garden, was pulled down as part of the plan for making a street at right angles to the existing row. The owner of the adjoining house was held not entitled to raise in his forecourt and garden buildings projecting beyond the line of buildings in the new street.—*London County Council v. Pryor*, L.R. [1896] 1 Q.B. 465; 74 L.T. 234.

### Mortgage:—

- (iv.) **C. A.**—*Payment of Mortgage by Purchaser of Property—Intention to Keep Incumbrance Alive.*—A charge on property may be treated as subsisting after it has been paid off by a purchaser of the property, if such an inference is not inconsistent with the intention of the parties as shewn by evidence (Kay, L.J., dissenting).—*Liquidation Estates Purchase Co., Limited v. Willoughby*, L.R. [1896] 1 Ch. 726; 74 L.T. 228.
- (v.) **Ch. D.**—*Redemption—Six Months' Interest or Notice.*—A mortgagee who has taken steps to obtain re-payment is entitled to principal, costs, and interest to date of tender, but is deprived of his equitable right to six months' interest in lieu of notice.—*Bovill v. Endle*, L.R. [1896] 1 Ch. 648.

### Partnership:—

- (vi.) **Ch. D.**—*Action for Account—Illegal Business—Gaming Act, 1853, s. 3.*—On the termination of the partnership between two bookmakers, the active partner refused to account for profits, and raised the defence that the business was illegal. There was no proof that the retiring partner knew that the business was carried on in an illegal manner, and an order for accounts was made.—*Thwaites v. Coulthwaite*, L.R. [1896] 1 Ch. 496; 74 L.T. 164.
- (vii.) **C. A.**—*Authority of Managing Partner—Action against Firm—Duty of Solicitor to Individual Partners.*—The managing partner of a trading firm has implied authority to instruct a solicitor to defend an ordinary action brought against the firm. The solicitor so instructed has authority to enter appearance in the names of the individual partners, and if judgment is recovered against the firm he is not guilty of negligence in informing only the managing partner of the fact.—*Tomlinson v. Broadsmith and Another*, L.R. [1896] 1 Q.B. 386; 74 L.T. 265.

**Penalties:—**

- (i.) **Q. B. D.**—*Diseases of Animals Act, 1894—Right of Private Persons to Commence Proceedings.*—A private person can sue for penalties under the Diseases of Animals Act and the Orders of the Board of Agriculture.—*Reg. v. Stewart*; *e. p. Burnham*, L.R. [1896] 1 Q.B. 800; 74 L.T. 54.

**Power:—**

- (ii.) **Ch. D.**—*Appointment to First Wife—Then to Children—Appointment to Second Wife Invalid.*—Where a husband under a power of appointment to "his wife" gives the fund on determination of his own life interest absolutely among his children subject to a life interest in one-fourth of the fund to his first wife; a subsequent appointment of the one-fourth to his second wife is invalid.—*In re Hancock*; *Malcolm v. Burford Hancock*, 74 L.T. 217.

**Practice:—**

- (iii.) **C. D.**—*O. lv. rr. 66A, 67, 70, 71—Certificate of Chief Clerk—Appointment to Sign Variation.*—An application for extension of time to move to vary a certificate on the ground that no notice had been received of the appointment to sign, was refused because attendance of any of the parties before a chief clerk for such a purpose is not necessary.—*In re Ingham*; *Lowe's Chemical Manure Co., Limited v. Ingham*, 74 L.T. 21.
- (iv.) **P. D.**—*Costs—Compromise of Suit for Judicial Separation.*—No order will be made for costs of deed of compromise of wife's suit for judicial separation in absence of provision for such costs on the deed itself. Agreement to pay "costs of suit" does not include costs of deed.—*Lancaster v. Lancaster*, L.R. [1896] P. 118; 74 L.T. 31 and 64.
- (v.) **C. A.**—*Divorce Proceedings—Motion for New Trial—Judicature Act, 1890, s. 1—O. lxiv., r. 7.*—A motion for a new trial of a divorce suit is governed by sect. 1 of the Judicature Act, 1890; and the Court has therefore power under O. 54 to impose terms on enlarging the time for moving for a new trial.—*Wilkins v. Wilkins*, L.R. [1896] P. 108; 74 L.T. 62.
- (vi.) **C. D.**—*In Default of Payment Action to be Dismissed—Default—Extension of Time.*—Where an order is made that in default of payment into Court by a fixed date an action be dismissed, the Court has jurisdiction after the date, but before application to dismiss, to extend the time.—*Collinson v. Jeffery*, L.R. [1896] 1 Ch. 644; 74 L.T. 78.
- (vii.) **C. A.**—*Trial without Jury under O. xxxvi., r. 5.*—An empty ship, to which compensation booms were attached, in being shifted by tugs to a new berth in dock was sunk. *Held* (Lopes, L.J., dissenting), that there was in the action an issue requiring scientific investigation, and that the Judge in Chambers had jurisdiction to direct a trial before a judge with assessors under O. xxxvi., r. 5.—*Swynn v. North-Eastern Railway Co.*, 74 L.T. 88.
- (viii.) **C. A.**—*Dismissal of Action for Want of Prosecution—Conditions—O. xxxvi., rr. 12, 16, 20.*—Where a defendant applies under O. 36, r. 12, to have an action dismissed for want of prosecution, the master or judge may dismiss the action absolutely, or contingently on notice of trial being given within a fixed time; or may make such other order as may seem just, but he is not bound to make entry of the action a condition.—*Sievier v. Spearman*, 74 L.T. 132.
- (ix.) **Ch. D.**—*Mistake in Consent Order—Jurisdiction.*—After judgment at a trial has been passed, and entered, on an order made by consent, the Court has no jurisdiction without the concurrence of all the parties, to set aside the judgment on the ground that consent was given by mistake.—*Ainsworth v. Wilding*, L.R. [1896] 1 Ch. 673; 74 L.T. 193.

- (i.) **C. A.**—*Sheriff—Seizure under fl. fa.—Claim by third person Admitted—Interpleader—Refusal of Protection*—O. lvii., rr. 1, 15, 16, 17.—The Court decided that the Judge in Chambers was right in refusing an order of protection to a sheriff who having seized goods claimed by a third person did not withdraw from possession after notice from the execution creditor to admit the claim, but sought relief by an interpleader summons.—*Sodeau v. Shorey*; *Shorey claimant*, 74 L.T. 240.
- (ii.) **C. A.**—*Pleading—"Precise Words of a Document"*—O. xix., r. 21.—A statement of claim alleged that "by the will of H. L. made on 27th February, 1783, and duly proved, M. T. became entitled to the estate in fee simple in reversion on the determination of certain estates tail limited in the said will" *Held* (reversing decision of the Court below), that the legal effect of the will was properly stated and that the precise words need not be set out.—*Darbyshire and Others v. Leigh and Another*, L.R. [1896] 1 Q.B. 554; 74 L.T. 241.
- (iii.) **P. D.**—*Divorce Practice—Irish Marriage—Evidence—Copy of Church Register*—14 & 15 Vict., c. 99, s. 14.—A copy signed and certified by the clergyman of the parish of an entry in the church register of a marriage solemnised in Ireland according to the rites of the Established Church of England and Ireland was accepted as evidence of the marriage.—*Wallace v. Wallace*, 74 L.T. 253.
- (iv.) **Ch. D.**—*Adding Official Receiver as Defendant*.—While an action was pending a receiving order was made against the defendant, and the plaintiff obtained an order adding the official receiver as a defendant. *Held*, that the order joining the official receiver must be discharged, as no estate or interest would become vested in him.—*Duffield v. Williams*; *in re Berry*, L.R. [1896] 1 Ch. 939; 74 L.T. 806.
- (v.) **Ch. D.**—*Foreclosure—Bankrupt Mortgagor—Security Valued—Accounts—Effect of Judgment*.—After judgment in the usual form in a foreclosure action it is too late for a trustee in bankruptcy of the mortgagor to raise a question respecting the form of account to be taken or to claim to redeem a security at the price at which the mortgagee had assessed it.—*Sanguinetti v. Stackey's Banking Co., Limited*, L.R. [1896] 1 Ch. 502; 74 L.T. 269.
- (vi.) **C. A.**—*Special Endorsement*—O. iii., r. 6.—The writ in an action against a tenant at will, for recovery of land, may be specially endorsed under O. iii., r. 6.—*Kemp and Another v. Lester*, 74 L.T. 268.

### Principal and Agent:—

- (vii.) **C. A.**—*Negligence of Contractor—Breach of Duty of Public Body—Damages—Remoteness*.—A district council employed to construct a sewer a contractor who, by his negligence, fractured a gas main, from whence gas escaped into a dwelling-house and exploded. *Held*, reversing the decision of the Court below, that the council owed to the public a duty which they could not delegate, that they were liable to the plaintiff for the breach, and that the damages were not too remote.—*Hardaker and Another v. The Idle District Council and Another*, L.R. [1896] 1 Q.B. 335; 74 L.T. 69.

### Railway:—

- (viii.) **R. & C. C.**—*Railway and Canal Traffic Act, 1894, s. 1, sub-s. 1*.—The Act does not declare that all increases of charge made by a railway company since December 31st, 1892, are void, but that the company must prove that the increase is reasonable.—*Rickett, Smith & Co., Limited v. Midland Railway Co.; Derbyshire Silkstone Colliery Co. v. the Same; Grassmoor Co., Limited v. the Same*, L.R. [1896] 1 Q.B. 260.

- (i.) **C. A.**—*Alterations of Works—Substitution—Railway Clauses Consolidation Act, 1845, s. 16—Compensation—Lands Clauses Consolidation Act, 1845.*—Sect. 16 enacts that a railway company may “from time to time” alter “warehouses, offices, and other buildings” and “substitute others in their stead.” What is a substitution depends upon circumstances, locality, connection with other works, and mode of user, and if these bring the operation within the company’s statutory powers, the only remedy of a person who suffers damage is by compensation under sect. 68 of the L.C.C. Act, 1845.—*Emsley v. North-Eastern Railway Co.*, L.R. [1896] 1 Ch. 418; 74 L.T. 113.

### Res Judicata:—

- (ii.) **Ch. D.**—*Patent.*—In answer to an action by a patentee for infringement, the defendant denied the validity of the patent. The Court upheld the validity, and in a second action by the patentee the defendant pleaded other grounds against the validity than those which he put forward in the first action. *Held*, that the question of validity was *res judicata*, and that the defendant was estopped.—*Shoe Machinery Co. v. Cutlan*, L.R. [1896] 1 Ch. 667.

### Restraint of Trade:—

- (iii.) **C. A.**—*Agreement—Construction.*—A person who had been in the employ of a dairyman was restrained, under the terms of an agreement, from “serving or interfering with any persons who were customers of the plaintiff at any time during the employment of the defendant by the plaintiff” (*Quare*, and still continued to be customers of the plaintiff).—*Dubowski v. Goldstein*, L.R. [1896] 1 Q.B. 478; 74 L.T. 180.

### Revenue:—

- (iv.) **C. A.**—*Stamp Act, 1891, s. 32—Order for Transfer of Private Money to Public Revenue—Stamp Duty—Exemption, No. 10.—Committee of London Clearing Bankers v. Commissioners of Inland Revenue*, L.R. [1896] 1 Q.B. 543; 74 L.T. 209. [Decision reported at p. 66 ante (iv.), affirmed.]
- (v.) **Q. B. D.**—*Succession Duty Act, 1853, ss. 15, 20, 21, 42—Sale by devisee of property subject to a lease—Increase in Value on determination—Alienee’s liability.*—Where the devisee of a fee simple subject to a lease alienates, duty is calculated on an annuity on his own life not on that of the alienee.—*Attorney-General v. Mander and Another*, 74 L.T. 103.
- (vi.) **C. A.**—*Probate Duty—Colonial Mortgage.*—Where by a will proved in England of a testator domiciled and dying in England, a fixed proportion of residue is left to a beneficiary who dies during administration and before any constituent of residue has been appropriated, probate duty is payable on mortgages of land in the Colonies which represent a part of the beneficiary’s share. Judgment of Q. B. D. reversed (Lord Esher, M.R., dissenting).—*Attorney-General v. Lord Sudeley and Others*, L.R. [1896] 1 Q.B. 354; 74 L.T. 91.
- (vii.) **H. L.**—*Legacy Duty or Succession Duty?*—Land was left to a tenant for life under a strict settlement, subject to a term of 500 years, the trustees of which were to pay out of the rents an annuity to the person entitled subject to the term to the receipt of rents, and to accumulate the surplus rents for 21 years from testator’s death and invest them in real estate, and after the 21 years to pay the rent to the person entitled to the real estate comprised in the term. *Held* (Rigby, L.J., dissenting), that the annuity was a charge on the estate, and that legacy and not succession duty must be paid.—*De Hoghton v. De Hoghton*, L.R. [1896] 1 Ch. 855; 74 L.T. 297.

- (i) **Ch. D.**—*Estate Duty—Debt due under Settlement—Finance Act, 1894, ss. 6, 7, 8, 9, 14*—By a marriage settlement it was covenanted that the executors of the settlor should, within six months of his decease, pay £25,000 upon the trusts declared. He left the residue of his real and personal property to trustees, who were also his executors, upon certain trusts. *Held*, that the estate duty as to the £25,000 must be borne by the executors.—*Gray v. Gray; re Gray*, L.R. [1896] 1 Ch. 620; 74 L.T. 275.
- (ii) **Q. B. D.**—*Equitable Mortgage—Conveyance under Foreclosure Order—Stamp—Stamp Act, 1891, ss. 54, 57*.—A conveyance to an equitable mortgagee under a foreclosure order is a "conveyance for sale" under sect. 54, the consideration under sect. 57 being the debt due under the mortgage.—*Huntington v. Commissioners of Inland Revenue*, L.R. [1896] 1 Q.B. 422; 74 L.T. 29.
- (iii) **Q. B. D.**—48 Geo. III., c. 55; 14 & 15 Vict., c. 36—*House Duty—Occupier—School Buildings—Masters' Houses*.—The governing body of a public school were assessed for house duty as occupiers of the school buildings and of the houses of masters, who paid less than the annual value in rent, and took boarders. *Held*, that the assessment was wrong, on the grounds that the masters themselves were the occupiers of their houses, and the school buildings were not inhabited dwelling houses.—*Charterhouse School (Governing Body of) v. Gayler (Surveyor of Taxes)*, L.R. [1896] 1 Q.B. 437; 74 L.T. 171; *Clifton College v. Thompson (Surveyor of Taxes)*, L.R. [1896] 1 Q.B. 432; 74 L.T. 168.

#### Sale of Goods :—

- (iv) **C. A.**—*Hire and Purchase—Disposal of Goods by Hirer—Factors Act, 1889, s. 9*.—An agreement to buy and to pay periodical instalments until purchase-money is cleared off, is within sect. 9 of Factors Act, and a pledge by a person in possession of goods under such an agreement to one who receives them in good faith, and without notice of adverse rights, is valid.—*Thompson & Shackell, Limited v. Veale*, 74 L.T. 130.

#### Ship :—

- (v) **P. D.**—*Salvage—Tug—Scope of Employment*.—A tug which has been engaged to tow a vessel may, if the vessel goes ashore before the tug has made fast to her, be entitled to salvage for getting her afloat.—*The Westburn*, 74 L.T. 200.
- (vi) **C. A.**—*General Average—Particular Average—Constructive Loss—Amount to be Contributed to in General Average*.—When a ship is sold as a constructive total loss, after a particular average damage and a general average sacrifice, the amount to be contributed to in general average is the remainder after deducting from the value of the ship before particular average damage, the estimated cost of repairs, and the sum realised by the sale of the ship; and the "one-third new for old" rule is not to be applied in calculating the cost of repairs.—*Henderson Bros. v. Shankland & Co.*, L.R. [1896] 1 Q.B. 525; 74 L.T. 238.
- (vii) **P. D.**—*Salvage*.—A contract made with the insurers to raise a wreck for remuneration not dependent on success, gives no rights *in rem*.—*The Solway Prince*, L.R. [1896] P. 120; 74 L.T. 32.

#### Shop Hours :—

- (viii) **Q. B. D.**—*Shop Hours Act, 1892—Employment Partly Out-doors*.—The time a newsboy was occupied partly within the shop of his employer and partly out of doors delivering papers. *Held*, that the entire employment was "in and about" the shop.—*Collman v. Roberts*, L.R. [1896] 1 Q.B. 457; 74 L.T. 198.

**Solicitor:—**

- (i.) **C. A.**—*Misconduct—Incorporated Law Society—Solicitors Act, 1898, s. 13.*—If the committee of the L. L. S. are of opinion that a solicitor in support of allegations of professional misconduct against a solicitor disclose no *prima facie* case, they may refuse to take further proceedings.—*Reg. (on the prosecution of Chapman) v. the Incorporated Law Society*, L.R. [1896] 1 Q.B. 327; 74 L.T. 67.
- (ii.) **Ch. D.**—*Statute Barred Costs—Land in Lots—Remuneration—Solicitors Remuneration Act, 1881, sch. 1, part 1, r. 8.*—Statute barred costs will be taxed where the client applies for a common order to tax. When land is bought in lots the charges may be those authorised by sched. 1, part 1, r. 8.—*In re Margetts; taxation*, 74 L.T. 309.
- (iii.) **Ch. D.**—*Question of Misconduct—Order to Tax Costs—Non-disclosure of Lunacy Petition against Client.*—A solicitor obtained an *ex parte* order to tax costs due by his client without mentioning that a lunacy petition had been presented against the client. *Held*, not to be professional misconduct such as to subject the solicitor to payment personally of costs of application to discharge the order.—*In re George Armstrong and Sons*, L.R. [1896] 1 Ch. 536; 74 L.T. 134.
- (iv.) **C. A.**—*Costs—Solicitors Remuneration Act, 1881.*—The scale of charges prescribed by r. 2, clause c, and not those under part 1 of sched. 1 of the Solicitors Remuneration Act, applies on the grant of an easement for the first time.—*In re Sanders's Settlement*, L.R. [1896] 1 Ch. 480; 74 L.T. 15 and 261.

**Trade Name:—**

- (v.) **H. L.**—*Descriptive Name—Known in Trade.*—No one has a right to represent the goods made by him as goods manufactured by another person, and, therefore, where a descriptive name has become identified in the trade with goods of a particular manufacturer, it may not be adopted by a rival manufacturer.—*Reddaway & Co. v. Banham & Co.*, L.R. [1896] A.C. 199; 74 L.T. 289.

**Trade Mark:—**

- (vi.) **P. C.**—*Different Label—Injunction—False Representation.*—The use of the same name, though on a different label, may be "an infringement of a trade mark." The use of the words "Manufactured by Royal Letters Patent" where it was not the manufactured article, but the machinery used in its production, that was patented, was *held*, not to be a false representation.—*Cochrane v. MacNish & Son*, L.R. [1896] A.C. 225; 74 L.T. 109.
- (vii.) **C. A.**—*Patents, Designs and Trade Marks Act, 1888, s. 10—Registration—Fictitious Person.*—The name of a character on a work of fiction such as "Trilby" is not the name of an individual under sect. 10 sub-division (a); and may therefore be registered as a trade mark if it does not fall within sub-division (e).—*Holt & Co. v. Saunders, Green and Co.*; *in re Holt & Co.'s trade mark*. L.R. [1896] 1 Ch. 711; 74 L.T. 225. Decision of Court below reversed (Kay, L.J. dissenting).

**Tramways:—**

- (viii.) **Q. B. D.**—*Bye-law—Production of Ticket.*—A bye-law of a tramway company requiring any passenger under a penalty to show his ticket when required by a servant of a company is reasonable and will be enforced.—*Lowe v. Volp*, L.R. [1896] 1 Q.B. 256; 74 L.T. 143.
- (ix.) **C. A.**—*Non-production of Ticket.*—A bye-law of a tramway company requiring a passenger to produce his ticket to an inspector or pay the fare again is reasonable.—*Hanks v. Bridgman*, L.R. [1896] 1 Q.B. 253; 74 L.T. 26.

**Trust:—**

- (i.) **C. D.**—*Trustees—Power to Invest on Trustees' Names—Securities to Bearer—Power to Postpone Sale—Unanimity.*—A gift of residue to trustees in trust to convert, with power to postpone the sale, and to invest on their names does not enable them to purchase securities payable to bearer, or to postpone conversion unless they are unanimous.—*In re Roth; Goldberger v. Roth*, 74 L.T. 50.
- (ii.) **Ch. D.**—*Voluntary Assignment of Contingent Rights—Death of Beneficiary before Vesting—Failure of Gift—Residuary Trust—Resulting Trust.*—When property is transferred to trustees on voluntary trusts which were declared before the settlor became entitled, the portion of a beneficiary who dies before the title of the settlor is perfected does not fall into the trust of residue but reverts to settlor as a resulting trust.—*In re Tilt; Lampet v. Kennedy*, 74 L.T. 163.
- (iii.) **Ch. D.**—*Breach of Trust—Account—Trustee Act, 1888.*—On the claim of an annuitant an account was ordered of rents and profits of real estate received by a trustee with a direction that money parted with by him more than six years before the issue of the writ was barred by the Trustee Act, 1888.—*How v. Winterton*, 74 L.T. 277.
- (iv.) **C. A.**—*Breach of Trust—Contribution.*—A trustee who is also a cestui que trust has no claim for contribution against his co-trustees for losses caused to him by breach of trust in which the trustees are in *pari delicto* until his own beneficial interest is exhausted.—*Chillingworth v. Chambers*, L.R. [1896] 1 Ch. 685; 74 L.T. 34.

**Waterworks:—**

- (v.) **C. A.**—*Metropolis Water Act, 1871, ss. 7, 16, 44, and 45—Constant Supply—Default—Penalties—Right to Sue.*—Proceedings to enforce penalties against a water company in the Metropolis for failing to keep up a constant supply, can be taken by the authority within whose jurisdiction the failure has happened, but not by a private individual.—*Kyffin v. East London Water Co.*, L.R. [1896] 1 Q.B. 446; 74 L.T. 141.

**Will:—**

- (vi.) **Ch. D.**—*Construction—Supplying Words.*—Residuary estate was left upon trust for division equally between all the children of the brothers and sisters of the testator's father, with the testator's "desire that the child or children of any one of such brothers and sisters as may be dead shall take his, her, or their deceased parents' share." *Held*, that the will must be read as if the word "child" had been written in after the words "any one."—*Frith v. Wilson; in re Wroe*, 74 L.T. 302.
- (vii.) **Ch. D.**—*Construction—"Legal Disability."*—Testator gave, subject to a life interest to his wife, real estate to his son, under condition that if the son should, at the death of testator's wife, "be under any legal disability in consequence whereof he could be hindered in or prevented from taking the same for his own personal and exclusive benefit," the property devised was to go to the son's wife and children. *Held*, that the legal disability contemplated was not one arising simply out of the voluntary act of the son, such as an application for a receiving order and for an adjudication in bankruptcy against himself during the life of his mother, but one arising by act of law.—*Carew v. Carew*, L.R. [1896] 1 Ch. 527; 74 L.T. 804 & 501.
- (viii.) **Ch. D.**—*Construction.*—A testator gave to a charity all the securities in his name held by a bank. *Held*, that certificates of shares in the Globe Telegraph Trust Co. deposited in the bank were not securities in his name, and that the bank did not "hold" India stock, as to which they had a power of attorney to sell and to receive dividends.—*In re Maitland; Chitty v. Maitland*, 74 L.T. 274.



- (i.) **Ch. D.**—*Legacy for Purpose of Planting Trees—Construction.*—Money left by a life tenant to be laid out in planting trees on the estate in accordance with the wish of the person for the time being in possession is a bequest for the benefit of the owners of the estate, and they are entitled to have the legacy in money.—*In re Bowes*; *Earl of Strathmore v. Vane*, L.R. [1896] 1 Ch. 507; 74 L.T. 16 (following *Lonsdale v. Bercholdt*, 1 K. & J. 185, and *re Skinner's Trusts*, 3 L.T. Rep., 177).
- (ii.) **Ch. D.**—*Construction—Legacy to Employé.*—A person who had been in the employ of a testator for more than ten years, but had quitted his service before the date of his will, and had never re-entered it, was held entitled under a direction to trustees "to pay to each man who shall have been in my employment in London over ten years, the sum of £10 for each year beyond the said ten years.—*In re Sharland*; *Kemp v. Rozey*, L.R. [1896] 1 Ch. 517; 74 L.T. 20.
- (iii.) **H. L.**—*Bequest of Personality upon Trusts Corresponding with Trusts of Realty—Alteration by Codicil—Construction.*—A testator devised, after a life estate, real property in trust for his nephews in tail male successively in order named, and directed his personality to be held as nearly as possible on corresponding trusts. By a codicil he required his will to be read as if the fees tail were in such order as his wife might appoint. His wife by will varied the order which he had indicated. *Held*, affirming the decision of the Court of Appeal, that the power to the wife extended to the personality as well as to the realty.—*Liddell v. Liddell*, 74 L.T. 105.
- (iv.) **P. D.**—*Absence of Attestation Clause—Position of Signatures—Witnesses Dead—Proof of Handwriting—Evidence.*—*Lord St. Leonard's Act*, s. 1.—Where one witness to a will, without attestation clause, had signed above the signature of the testator, and both witnesses were dead, it was *held* that the will was entitled to probate on oral proof, combined with comparison of samples, of the handwriting of the testator and of one witness; and on a comparison of the signature to the will of the other witness, with a signature written by him 50 years earlier.—*Byles and Others v. Cox and Others*, 74 L.T. 222.
- (v.) **Ch. D.**—*Trusts to Prevent Alienation of Income—Garnishee Order.*—A testator left property in trust "to pay to my son so much of the income as would not, although the same were payable to him, be, by his act or default or by operation or process of law, so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the same income as would if it were payable to my said son be disposed of as last aforesaid for the benefit of his wife and children." On the 16th April, 1895, the balance of income due to the son was in the hands of the trustees. On the 17th there was served on them a garnishee order on behalf of judgment creditors of the son. On a claim by the wife, it was *held*, that the trusts were valid in law; that the destination of any instalment of income was determined the moment the instalment accrued due or was in the hands of the trustees; and that the wife, therefore, never became entitled under the trust.—*In re Sampson*; *Sampson v. Sampson*, L.R. [1896] 1 Ch. 630; 74 L.T. 246.

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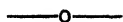
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## Obiter Dicta.

THE nineteenth Annual Meeting of the American Bar Association was a memorable one. It was held at Saratoga Springs on August 19th, 20th and 21st. The President, Moorfield Storey, of Boston, Mass., was present, together with many eminent members of the American Bar. Lord Russell of Killowen delivered an address on International Arbitration, and on the same day Mr. Montague Crackanthorpe, Q.C., a member of the English Council of Legal Education, addressed the meeting on Legal Education. Sir Frank Lockwood, Q.C., M.P., was also present.

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During the last month a curious incident occurred in London. A Chinese who was sought for by the authorities of his own country, and had come to London, was by some means taken into the Chinese Embassy there, and was not permitted to leave. Rumours of physical injury to the *détenu* were rife; the Foreign Office were requested by the friends of the *détenu* to intervene, with the result that the man was released. This raises a curious question of International Law, viz., whether an Ambassador can imprison or punish natives of his own country within the Embassy walls. On the one hand it may be said that the *hôtel* of an Ambassador is inviolable; but on the other it may more justly be observed that this privilege is a

toleration by the Laws of the State, to which the public minister is accredited, and must not be abused. We commend Lord Salisbury for his firmness. But for this, we should next have heard of an Englishman being taken and imprisoned within the walls of one of the minor Embassies; or even of an Embassy being used as a gambling house, or a foundry for false coin.

The negligent manner in which witnesses are allowed to wander in and out of Court, during a trial, in this country ought not to be permitted. It is not an uncommon practice for counsel on either side to ask at the beginning of a trial that all witnesses may be ordered out of Court. This is acceded to by the judge; but with what result? A witness has told his tale, and passes out of Court, in many cases to tell the others what questions he has been asked, and what he has replied. This practice offers every facility for perjury.

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Some lawyers may recollect the remarks made by Lord Justice (then Mr. Justice) Kay some years ago on this subject, and reported in the *Times*, 13th December, 1882, in the case of *Horwood v. The L.C. Company*. He said that he was greatly impressed with the inexpediency of having witnesses in Court during the whole progress of a case, and that he recently had an opportunity of observing the practice of the French Courts in that respect. In France a convenient room is provided for witnesses to wait in, and no witness is allowed into Court until his turn comes to be examined. His Lordship wished that this practice could be adopted here, for it was no uncommon thing to have witness after witness coming up and repeating parrot-like what they had heard the previous witnesses say. If some such rule as that to which he had alluded were made by a Supreme authority, it would, in his Lordship's opinion, be of great value.

## I.—SKETCH OF THE LIFE AND CHARACTER OF MR. JUSTICE MAULE.\*

THIS remarkable man was the son of a respectable apothecary at Tottenham. He was sent at the proper age to Trinity College, Cambridge, where as an undergraduate he went very little into the Society of the University and occasioned some surprise at coming out as Senior Wrangler in the year 1810. From Cambridge he proceeded to Lincoln's Inn, and having kept the proper number of Terms without the occurrence of anything extraordinary, was duly called to the Bar by that Society. He chose for his circuit the Oxford, and attended the Gloucester and Herefordshire Sessions. He also for many years went the Brecon Welsh Circuit. It must be confessed that his success at the Bar was by no means adequate to his talents. His having been Senior Wrangler appeared to be of no weight in his favour in the eyes of the Gloucestershire and Herefordshire attorneys. For years he diligently attended at the Gloucester Assizes and Sessions, with very small profit. And it must have been very mortifying to him to see the success of other barristers far his inferior in all respects. He was a good lawyer besides an excellent classical scholar and a good linguist. That such a man should compete in vain with the shallow frequenters of Gloucester Sessions was lamentable indeed. On the Brecon Circuit alone was he successful. There the nature of the practice brought Maule's refined arguments and obstinate adherence to any points he made into prominence and he had a fair share of the business. On

\* The Editor is indebted to the courtesy of a very eminent lawyer of the present day for the gift of this Article, which was written by a contemporary of Mr. Justice Maule.

#### 4 SKETCH OF LIFE AND CHARACTER OF MR. JUSTICE MAULE.

the Oxford Circuit his briefs continued very scarce, and he used to spend his time in mere idleness. But he made the acquaintance of a co-circuiter which soon grew into close friendship and completely changed his character. This was H. E., afterwards Ld. H. Until Maule made this acquaintance he had gone little into society and lived quietly. But H. E. was a most agreeable companion, and soon obtained a complete ascendancy over Maule, being a man of "wit and pleasure" about town, indulging in every description of profligacy, and conversing with all the wit and pleasantry of men of his class. Maule was soon his satellite, and both in town and on the circuit they were firm friends and companions in every sort of dissipation. From that time Maule's conversation, although full of good stuff, abounded in licentiousness, and continued so for many years.

Maule was never in full business on the Oxford Circuit, but in London he by degrees got a good deal of London commercial business, and became standing Counsel to several of the great companies. In the year 1840 he was made a Judge to the great surprise of many people. [On March 6th, 1838] he had by his carelessness set fire to [Nos. 13 and 14, Paper Buildings, in] the Temple, which led to the loss of a great deal of valuable property, books and papers. It was believed by many that he had caused the fire by going to bed in a state of intoxication, but this is false as has been fully proved by one who was in his company on the evening the fire occurred. He was accustomed to read in bed at night, and that dangerous habit most probably caused the fire. Maule made an excellent Judge both at *Nisi Prius* and in Banc. His *obiter* remarks on a case while arguing are full of learning and acuteness. His judgments are profound and exhaustive and very original, and his reasoning was admirable and unanswerable. When presiding over a

case at Nisi Prius nothing could be more clear and cogent than his summing up to the jury. In criminal cases he was patient and luminous. In his demeanour to Counsel he was, generally speaking, courteous and obliging, though sometimes caustic and keenly sarcastic, and when he thought an argument was ridiculous, and that Counsel deserved to be told so, nothing could be more successful than his dissection of such an argument, and on such occasions he shewed that he had a genuine relish for the humorous, and indeed he had a very high talent for sarcasm. These qualities rendered his judicial performances most entertaining, and many men made a point of being present in the Common Pleas during Term in order to hear his shrewd, witty, and comical remarks. In private life he was a charming companion, full of curious information and sometimes learned. In a large party he was sometimes silent and almost morose. It was when the other guests were one or two that he shone, and the variety and extent of his knowledge, and his recollection of striking anecdotes, and his own keen and lively remarks made him a delightful associate. He had fought in early life a duel with Mr. B., the Counsel. Maule, who was sitting behind him in the Court of King's Bench, made some observation which raised a laugh, and which had nothing to do with Mr. B. But he fancied it had, and therefore addressed a very strong observation to Maule, so strong that no apology could be offered for it, so they went out and fought. To say the truth, Maule was rather proud at having fought a duel and dwelt on the occurrence with great complacency in after life. Maule had the reputation of being a very dissipated man, but the fact was he was proud of it, and was himself the inventor of many of the vicious exploits narrated by him. He had the pernicious, dangerous ambition of uniting the character of a *roué* to that of a scholar and a mathematician.

"He'd shine a Tully and a Wilmot too," and he rather overacted the part of *roué*. During the latter part of his life he spent most of his time at the Union Club. His vigour, ability, and elasticity of mind continued unaltered to the close of his career, but his bodily strength and vigour had sadly decreased. It was a melancholy sight to see him arrive at the Court of Common Pleas wrapped up as it were in swaddling clothes, and making for the fire to warm his withered hands, by the side of which he sat shivering till they had robed him. The moment he took his seat on the Bench he became an altered creature. His questions and remarks were as shrewd and penetrating as in his days of health and youth.

## II.—AN INTERNATIONAL ARBITRATION IN THE MIDDLE AGES.

THE eloquent and masterly address lately delivered by Lord Russell of Killowen before the American Bar Association at Saratoga Springs has imparted to the subject of International Arbitration an historical interest, which was perhaps wanting to it before his Lordship availed himself of the opportunity to show that the subject had a venerable history of its own, the traces of which have been preserved in the pages of one of the most famous historians of ancient Greece (Thucydides). His Lordship has further proceeded in the same address to illustrate the views of an enlightened Paganism on this subject, as reinforced in Christian times, during which the peace of the world was frequently saved from rupture by the arbitrament of the Pope, as the Head of Christendom, who after the disruption of the Roman Empire, became for a time the interpreter and almost the embodiment of International Law. His

Lordship, however, has been too modest to say anything about the example which England may be justly said to have set to Europe on an occasion when the parties interested were reluctant to submit their dispute to either Pope or Emperor, and when Henry the Second of England was called upon to arbitrate between the Kings of Seville and of Navarre. This Arbitration was of the first importance to Christendom, as the result of it was to lay the foundations of a peace, which was a requisite preliminary towards the successful combination of the forces of the Christian Powers of Spain against the Supremacy of the Moors. It was not, however, until the rival kingdoms of Castile and of Aragon had become consolidated in one monarchy in the latter years of the fifteenth century that the Moors were finally expelled from Spain.

There was, however, on the occasion of Lord Russell's address no reason to fear, that, if his Lordship had spoken freely on this subject, his utterance would have been held by his audience to savour of boastfulness, for our cousins on the other side of the Atlantic have a common share with ourselves in the inheritance of Fame, which is the appanage of the descendants of the men who lived in the twelfth century under the legal institutions of the sagacious King Henry II. of England. It is accordingly with a firm conviction, that our transatlantic cousins will sympathise with my endeavour, that I have ventured on the present occasion to supply, with my pen, what Lord Russell would possibly have thought it superfluous to allude to orally amidst a wealth of subjects of a more immediate interest to his audience.

I might with good reason have spoken of King Henry the Second of England on this occasion as a great King, for he was an undeniable artificer of England's greatness, inasmuch as he built up both a financial and a judicial system which have endured to the present day, and,



further, it has been justly observed by a living historian of great research, who avows himself to be an unfriendly critic of Henry the Second's government, that his ministers, who at the beginning of his reign were little more than officers of the King's household, were at the termination of it the administrators of the Realm of England. I am, however, content to pronounce Henry II. to have been one of the most sagacious of the Kings of England, and on that account I hold his conduct of the Spanish Arbitration to be worthy of our attention at the present day, for it shows that he considered it to be a personal honour to have been invited to Arbitrate between two independent princes, and that he felt it to be his duty on such an occasion to provide that his decision should be arrived at by a procedure which should secure it from any suspicion of partiality, seeing that one of the parties was his own son-in-law, namely, King Alfonso VIII., of Castile.

A full account of the method adopted by the King to secure such a result has been handed down to us in a Chronicle of the reign of Henry the Second, which is commonly attributed to Abbot Benedict of Peterborough, the text of which Chronicle was edited in print as Benedict's work for the first time at Oxford in 1735 by the indefatigable Thomas Hearne, whose book is extremely rare in the present day, but a copy of it exists in the Library of Lincoln's Inn.\* The Spanish Arbitration thus became known to Men of Letters in the early part of the last century through this edition, the text of which was transcribed by Hearne from a manuscript then in the Library of the Earl of Oxford, and Hearne's transcript is preserved in the present day in the Bodleian Library, Oxford, where it has a place amongst the Rawlinson MSS. as B. 183. The student, however, in our time need not go in search of a

\* There is also a copy in the Library of the Athenæum Club.

copy of Hearne's edition,\* nor need he make a pilgrimage to Oxford to satisfy himself with a sight of the Rawlinson MS., for another and a preferable manuscript has come to light during the present century, which seems to have been overlooked for a long time, during which its history is unknown, but its known history commences with the reign of Queen Elizabeth, when it was in the possession of William Cecil, the great Lord Burghley, the Queen's High Treasurer and Her Majesty's most highly trusted Councillor. Lord Burghley justly set a high value on this manuscript, and his signature is at the beginning of the volume. It passed from his hands into those of Sir Robert Cotton, a diligent collector at this time of rare MSS., and it is now preserved in the British Museum amidst the Cotton MSS. in a volume which is entitled Julius A. XI. On examining this MS. it would appear that Sir Robert Cotton carefully read and marked the manuscript, and has written on the margin of fol. 29 of the volume in which the manuscript is bound, and where Benedict's work commences, the title † *Benedictus Abbas de Vita Henrici II.* In explanation of this fact I may mention that Benedict's Chronicle was originally anonymous, as was the condition of most Chronicles in the twelfth and thirteenth centuries, and as in those days copyright was unknown, if the authorship of a Chronicle was thought worth usurping, the MS. was copied without a word of acknowledgment, and the text was re-issued, so to say, under the copier's name. It has thus happened, not to mention other instances, that a text of Benedict's Chronicle appears to have been copied for a work, of which a manuscript is preserved in the Library of Corpus Christi College, Cambridge, and is entitled "*Annales*

\* Professor Stubbs had a difficulty in procuring a sight of a copy.

† The Bishop of Oxford (Professor Stubbs) holds that Lord Burghley wrote this title, but high living authorities in the British Museum attribute it to Cotton.

*Angliæ per Walterum Coventrensem*," and it is numbered MS. CLXXV. in the College Catalogue. The pirated work in this particular case has also been discovered in another MS. under the pseudonym of *Memoriale Walteri Coventrensis*.

In an analogous manner the Vitellius MS., E. XVII., which is in the Cotton Collection in the British Museum, and which, if I mistake not, is a remote ancestor of a MS. which Hearne consulted in preparing his edition of Benedict's Chronicle in 1735, was regarded in the Middle Ages as a continuation of the Chronicle of Simeon of Durham, and it was known under that name when it was presented by William Camden Clarencieux, King of Arms, to Sir Robert Cotton. The Julius manuscript, on the other hand, has maintained its identity down to the present day, but it remained a long time in obscurity, having been superseded, so to say, by a text which is preserved in the great compilation of Master Roger, of Hoveden, and which contains a record of the Spanish Arbitration that may be regarded as of rival authority with the contemporary record generally attributed to Benedict of Peterborough. Benedict was probably present at the King's Court, in which the proceedings of the Arbitration were carried on. He was at that time the Chancellor of Archbishop Richard of Canterbury, whose name stands at the head of the list of members of the Curia Regis, whom Benedict enumerates as being present, and it was the duty of the Chancellor to be in attendance on the Archbishop on such an occasion. Roger, of Hoveden, on the other hand, was a Royal Clerk or Secretary, who had been frequently employed by the King on diplomatic missions abroad and on delicate negotiations at home, who would probably be in attendance on the King himself at Westminster during the sittings of the King's High Court. Such a person would have had little difficulty in obtaining access to any official Court paper of the period, and Hoveden's

text of the Court papers of the Spanish Arbitration has all the appearance of being as authentic a record as that of Benedict himself. We need not therefore be surprised to find that several learned French scholars in the eighteenth century have thought more highly of Hoveden's text of the Arbitration than of the text which Hearne had followed in his edition of Benedict's Chronicle in 1735, and to which I have already briefly alluded. Professor Stubbs, now Lord Bishop of Oxford, who, as Regius Professor of Modern History in the University of Oxford, has edited in 1867, in the Rolls Series, the Chronicle commonly known under the name of Benedict of Peterborough, has prefixed to the first volume of his edition a most interesting preface, in which he alludes to the fact that a considerable portion of Benedict's Chronicle has been reprinted from Hearne's edition, and has been incorporated into the 13th volume of the *Recueil des Historiens des Gaules et de la France*,\* and further that in the 17th volume of the same *Recueil* the editor has impugned the soundness of the text, which has been adopted by Hearne, and has framed a new text of Benedict's work from a collation with Hoveden's text. That process, however, need not be repeated in the present day, as we have now access to the Cecil manuscript, the author of which we know to have been the Archbishop's Chancellor, and the penmanship of which has been pronounced by experts to be of the same period as the Arbitration itself.

It has been suggested by several critics, who have briefly noticed the Spanish<sup>o</sup> Arbitration, that the text of the official

\* This work is more generally known under the title of *Gallicarum et Franciscarum Rerum Scriptores*, par Dom Martin Bouquet, under which title it appears in the catalogue of the London Library. It will be found under the name of Bouquet (Dom Martin) in the catalogues of Lincoln's Inn and of the Athenæum Club. I have to thank Sir E. Thompson, K.C.B., and Mr. G. F. Warner, of the British Museum, for a clue to the correct title of this work.

papers has been copied from a common original, but no one has ventured to say in what archives the original may have been deposited or where we may look for it in the hope of coming upon its traces. It is a noticeable circumstance that the building known as the Exchequer, which in after times has served as the repository of our most valuable legal documents, was not in such use in the year 1177, in which year the Spanish Arbitration took place, and in which, according to the *Dialogus de Scaccario*, the first line of that treatise was drawn by Richard, Bishop of London, Treasurer of the Exchequer. If I had to embark my readers on a voyage of conjecture, I should accordingly set my vessel's course on a direct line to the Tower of London, for there the official papers of the Arbitration would have been under the charge of the Great Justiciar of England, the *Alter Ego* of the Crown in the absence of the King from the Realm of England, but my own opinion inclines to the view that the original papers were carried to Spain by the envoys on their return, and no originals remained in this country, with which Benedict's text and Hoveden's text might have been collated, so that the omissions of certain words in them might have been supplied, for certain gaps in the text do exist in both cases.

There are, however, some matters within the region of sober fact which may interest the reader, and which are amongst the circumstances which account for the preservation of a formal record of the proceedings of King Henry's Court on this occasion. It would appear from the *Chronicle of Benedict*, of Peterborough, that the Kings of Seville and of Navarre sent each of them envoys of high rank to attend the King's Court at such time and place as the King should appoint, and that the envoys first appeared before the King at Windsor on 8th March, 1177, where they submitted to the King a Convention signed by the two Spanish monarchs on 28th August, 1176, in which they

agreed to submit their disputes to the judgment of the King of England, and bound themselves to abide by his award. The text of the Convention itself is recorded by Benedict, and is printed in the Rolls Series from the Cecil MS., the text of which will be found to be more correct than the text which Hearne has followed.

King Henry, on this occasion, appointed a day to hear the envoys in London, but at the first hearing of them it was found that their Spanish pronunciation of the Latin language would cause their arguments to be unintelligible to the earls and baron, who with the Bishops of the two provinces of Canterbury and York constituted the King's High Court. The King accordingly adjourned his Court for three days, and directed the envoys of either party to state meanwhile the case of their party in writing. The respective claims of the two monarchs were thus reduced into the form of what civilians would describe in the present day as Acts on Petition, and were subscribed by the respective envoys, and having been duly propounded, have thus come to be preserved in writing in the present day. No responsive allegation appears to have been tendered on either side, and the King gave judgment on the uncontradicted pleas of the two parties.

It is a happy circumstance that on this occasion the official text of the King's Judgment has been preserved in addition to the official text of the pleadings in the case, as the King's Judgment brings to our notice the names of the individual members of the Curia Regis, who attested the King's Judgment as witnesses, the signature of Archbishop Richard, of Canterbury being at the head of the Bishops, that of Geoffrey, the King's son, Earl of Brittany, at the head of the Earls, and that of Richard de Luci, the Great Justiciar of England, at the head of the Barons. It will thus be seen that the Chief of the King's Justices, the prototype, if I may use such a term, of the magistrate

who fills the high office of Lord Chief Justice of England in the nineteenth century, took part personally in the twelfth century in the business of a great International Arbitration. It is thus not without a precedent that Lord Russell of Killowen has deprecated the constitution of permanent tribunals to arbitrate between the nations of the civilised world, for if we are disposed to study a page in the book of the most sagacious of the Kings of England, we shall find that he considered that the business of an International Arbitration might require on the part of the arbitrating State the constitution *ad hoc* of a tribunal which should comprise its highest judicial functionaries, so as to ensure the competency of the tribunal to deal judicially with the questions brought before it, whether those questions should be questions of law or questions of fact, for although on the occasion of the Spanish Arbitration there was no responsive allegation propounded in contradiction to the case set up by either party in his Act on Petition, both Benedict, of Peterborough, and Roger, of Hoveden, take care to state that the envoys of each King had in their suite a stalwart champion prepared to do battle for his King in case of any fact being brought into dispute between the parties, and of the King of England directing the dispute to be settled by a duel, and Roger of Hoveden mentions the additional fact that the champions brought with them their armour and their horses.

On the other hand, the same King did not think it necessary that a High Court of Judicature should be called upon in every case to arbitrate between nations which might be disposed to settle a dispute about territory by a friendly reference, rather than to have recourse to the arbitrament of the sword. For the same Chroniclers have recorded in the same year the terms of a peace (of Ivry) between King Henry the Second of England and Lewis the Seventh of France, under which the two monarchs agreed

to take the Cross together and go on a Crusade to Jerusalem, and meanwhile to refer their disputes about Auvergne and other territories to Arbitration, and they forthwith proceeded to nominate the arbiters on behalf of the two monarchs, namely, three Bishops and three Barons on the side of Lewis, and three Bishops and three Barons on the side of King Henry. *Sic parva licet componere magnis.*

The lesson which we learn from the above facts in Henry the Second's reign is that there is no necessity for nations to bind themselves to designate, *à priori*, permanent tribunals of Arbitration without any knowledge of the subjects upon which the tribunals may be called upon to arbitrate, so long as their respective Governments are prepared, and by State-Law are empowered, to refer the subject-matter of any important International dispute to the arbitrament of their highest Judicial functionaries. The space at my disposal on this occasion will not allow me to discuss this topic at any greater length.

TRAVERS TWISS.

### III.—COUNT VON MOLTKE AND PROFESSOR BLUNTSCHLI ON THE LAWS OF WAR.

THE following interesting opinions of the late Count von Moltke, Field Marshal General, and of the late Dr. Bluntschli, Privy Councillor and Professor of Law, on the Laws of War, had for cause the publication of the "Manual of the Laws of War by Land" by the *Institut de Droit International* in 1880. A copy of this work having been sent to Count von Moltke, he wrote as follows:—

"BERLIN, December 11th, 1880.

"You have been so good as to forward to me the Manual published by the *Institut de Droit International*, and you hope for



my approval of it. In the first place, I fully appreciate the philanthropic effort to soften the evils which result from war. Perpetual peace is a dream, and it is not even a beautiful dream. War is an element in the order of the world ordained by God. In it the noblest virtues of mankind are developed; courage and abnegation of self, faithfulness to duty, and the spirit of sacrifice; the soldier gives his life. Without war the world would stagnate, and lose itself in materialism.

"I agree entirely with the proposition contained in the introduction that a gradual softening of manner ought to be reflected also in the mode of making war. But I go further, and think the softening of manners can alone bring about this result, which cannot be attained by a codification of the law of war. Every law presupposes an authority to superintend and direct its execution, and international conventions are supported by no such authority. What neutral States would ever take up arms for the sole reason that two Powers being at war the 'laws of war' had been violated by one or both of the belligerents? For offences of that sort there is no earthly judge. Success can come only from the religious, moral education of individuals, and from the feeling of honour and sense of justice of commanders who enforce the law and conform to it, so far as the exceptional circumstances of war permit. This being so, it is necessary to recognise also that increased humanity in the mode of making war has in reality followed upon the gradual softening of manners. Only compare the horrors of the 'Thirty Years' War with the struggles of modern times. A great step has been made in our own day by the establishment of compulsory military service, which introduces the educated classes into armies. The brutal and violent element is, of course, still there, but it is no longer alone, as once it was. Again, Governments have two powerful means of preventing the worst kind of excesses—strict discipline maintained in time of peace, so that the soldier has become habituated to it, and care on the part of the department which provides for the subsistence of troops in the field. If that care fails, discipline can only be imperfectly maintained. It is

impossible for the soldier who endures sufferings, hardships, fatigues, who meets danger to take only 'in proportion to the resources of the country.' He must take whatever is needful for his existence. We cannot ask him for what is superhuman.

"The greatest kindness in war is to bring it to a speedy conclusion. It should be allowable with that view to employ all methods save those which are absolutely objectionable. I can by no means profess agreement with the Declaration of St. Petersburg when it asserts that 'the weakening of the military forces of the enemy' is the only lawful procedure in War. No, you must attack all the resources of the enemy's Government—its finances, its railways, its stores, and even its prestige. Thus energetically, and yet with a moderation previously unknown, was the late war against France conducted. The issue of the campaign was decided in two months, and the fighting did not become embittered till a revolutionary Government, unfortunately for the country, prolonged the war for four more months.

"I am glad to see that the "Manual," in clear and precise articles, pays more attention to the necessities of war than has been paid by previous attempts. But for Governments to recognise these rules will not be enough to insure that they shall be observed. It has long been a universally recognised custom of warfare that a flag of truce must not be fired on, and yet we have seen that rule violated on several occasions during the late war. Never will an article learnt by rote persuade soldiers to see a regular enemy (Sections 2—4) in the unorganised population which takes up arms 'spontaneously' and puts them in danger of their life at every moment of day and night. Certain requirements of the Manual might be impossible of realisation—for instance the identification of the slain after a great battle. Other requirements would be open to criticism did not the intercalation of such words as 'if circumstances permit,' 'if possible,' 'if it can be done,' 'if necessary,' give them an elasticity, but for which the bonds they impose must be broken by inexorable reality. I am of opinion that in war, where everything must be individual, the only Articles which will prove

efficacious are those which are addressed specifically to commanders. Such are the rules of the Manual relating to the wounded, the sick, the surgeons, and medical appliances. The general recognition of the principles, and of those also which relate to prisoners, would mark a distinct step of progress toward the goal pursued with so honourable a persistency by the *Institut de Droit International*.

"COUNT VON MOLTKE."

To this letter Dr. Bluntschli replied :—

"Christmas, 1880.

"I am very grateful for your Excellency's detailed and kind statement of opinion as to the Manual of the Laws of War. This statement invites serious reflections. I see in it a testimony of the highest value, of historical importance; and I shall communicate it forthwith to the members of the *Institut de Droit International*.

"For the present I do not think that I can better prove my gratitude to your Excellency than by sketching the reasons which have guided our members, and so indicating the nature of the different views which prevail upon the subject. It is needless to say that the same facts present themselves in a different light and give a different impression as they are looked at from the military or the legal point of view. The difference is diminished, but not removed, when an illustrious general from his elevated position takes also into consideration the great moral and political duties of States, and when, on the other hand, the representatives of the science of international law set themselves to bring legal principles into relation with military necessities. For the man of arms the interest of the safety and success of the army will always take precedence of that of the inoffensive population, while the jurist, convinced that law is the safeguard of all, and especially of the weak against the strong, will ever feel it a duty to secure for private individuals in districts occupied by an enemy the indispensable protection of law. There may be members of the Institut who

do not give up the hope that some day, thanks to the progress of civilisation, humanity will succeed in substituting an organised international justice for the wars which now-a-days take place between sovereign States. But the body of the Institut, as a whole, well knows that that hope has no chance of being realised in our time, and limits its action in this matter to two principal objects the attainment of which is possible :—

“1. To open and facilitate the settlement of trifling disputes between nations by judicial methods, war being unquestionably a method out of all proportion in such cases.

“2. To aid in elucidating and strengthening legal order even in time of war.

“I acknowledge unreservedly that the customs of warfare have improved since the establishment of standing armies, a circumstance which has rendered possible a stricter discipline, and has necessitated a greater care for the provisionment of troops. I also acknowledge unreservedly that the chief credit for this improvement is due to military commanders. Brutal and barbarous pillage was prohibited by generals before jurists were convinced of its illegality. If in our own day a law recognised by the civilised world forbids, in a general way, the soldier to make booty in warfare on land, we have here a great advance in civilisation, and the jurists have had their share in bringing it about. Since compulsory service has turned standing armies into national armies, war also has become national. Laws of war are consequently more than ever important and necessary, since, in the differences of culture and opinion which prevail between individuals and classes, law is almost the only moral power the force of which is acknowledged by all, and which binds all together under common rules. This pleasing and cheering circumstance is one which constantly meets us in the *Institut de Droit International*. We see a general legal persuasion ever in process of more and more distinct formation uniting all civilised peoples. Men of nations readily disunited and opposed—Germans and French, English and Russians, Spaniards and Dutchmen, Italians and Austrians—are, as a rule, all of one mind as to the principles of International Law,

This is what makes it possible to proclaim an international law of war, approved by the legal conscience of all civilised peoples; and when a principle is thus generally accepted it exerts an authority over minds and manners which curbs sensual appetites and triumphs over barbarism. We are well aware of the imperfect means of causing its decrees to be respected and carried out which are at the disposal of the law of nations. We know also that war, which moves nations so deeply, rouses to exceptional activity the good qualities as well as the evil instincts of human nature. It is for this very reason that the jurist is impelled to present the legal principles, of the need for which he is convinced, in a clear and precise form, to the feeling of justice of the masses, and to the legal conscience of those who guide them. He is persuaded that his declaration will find a hearing in the conscience of those whom it principally concerns and a powerful echo in the public opinion of all countries.

“The duty of seeing that International Law is obeyed and of punishing violations of it belongs, in the first instance, to States each within the limits of its own supremacy. The administration of the law of war ought, therefore, to be intrusted primarily to the State which wields the public power in the place where an offence is committed. No State will lightly, and without unpleasantness and danger, expose itself to a just charge of having neglected its international duties; it will not do so even when it knows that it runs no risk of war on the part of neutral States. Every State, even the most powerful, will gain sensibly in honour with God and man if it is found to be faithful and sincere in respect and obedience to the law of nations. Should we be deceiving ourselves if we admitted that a belief in the law of nations, as in a sacred and necessary authority, ought to facilitate the enforcement of discipline in the Army and help to prevent many faults and many harmful excesses? I, for my part, am convinced that the error, which has been handed down to us from antiquity, according to which all law is suspended during war and everything is allowable against the enemy nation—that this abominable error can but increase the

unavoidable sufferings and evils of war without necessity, and without utility from the point of view of that energetic way of making war which I also think is the right way.

"With reference to several rules being stated with the qualifications 'if possible,' 'according to circumstances,' we look on this as a safety-valve, intended to preserve the inflexible rule of law from giving way when men's minds are overheated in a struggle against all sorts of dangers, and so to insure the application of the rules in many other instances. Sad experience teaches us that in every war there are numerous violations of law which must unavoidably remain unpunished, but this will not cause the jurist to abandon the authoritative principle which has been violated. Quite the reverse. If, for instance, a flag of truce has been fired upon, in contravention of the law of nations, the jurist will uphold and proclaim more strongly than ever the rule that a flag of truce is inviolable.

"I trust that your Excellency will receive indulgently this sincere statement of my views, and will regard it as an expression of my gratitude, as well as of my high personal esteem and of my respectful consideration.

"DR. BLUNTSCHLI."

#### IV.—IS *TOMPSON v. DASHWOOD* OVERRULED?

THE fragmentary manner in which English Law has been built up renders it a matter of extreme uncertainty in many cases to determine the effect upon the juristic character of an act of the actor's state of mind. The consequences of negligence in connection with misrepresentation have formed the subject of controversies, not to be terminated by even a decision of the House of Lords. The relation of negligence to defamation demands an equally searching investigation, in the course of which it will be necessary to consider, amongst others, three cases, which it is the object of this paper to compare with one another.

*Tompson v. Dashwood* (11 Q.B.D., p. 43) decided in 1883, was a case in which the defendant wrote a letter which was *prima facie* defamatory, intending to send it to a person who had a common interest with the defendant in the plaintiff's character and conduct. In that case, it would have been a privileged communication; but, by mistake, the defendant placed the letter in a wrong envelope, and it reached a third party. It was held by a divisional court that the judge at the trial was right in directing the jury to find for the defendant, if they thought that the letter was not written maliciously or with an indirect motive.

This decision may be placed on two grounds: 1st—Passing by the question of privilege altogether, there was no wilful publication to the person who received the letter. A wilful publication of defamatory matter implies malice, but it does not follow that a negligent or inadvertent publication does so—and no express malice was here shown to exist. This view seems to predominate in the judgment of Mathew, J. 2nd—(and this is the ground which is relied on in the leading opinion)—privilege extends to protect *bona fide* dealings with defamatory matter prepared for use on a privileged occasion.

A previous case, *Shepherd v. Whitaker*,\* appears at first sight to be inconsistent with the former of these grounds; for nothing more than negligence was there alleged. The defendant, who was the publisher of a trade circular, represented the plaintiff as having become bankrupt, instead of having (as was the case) dissolved a partnership. This was done through the mere negligence of the defendant's servant: yet the action was successful.

But a fundamental distinction lies in the fact that the defendant in *Shepherd v. Whitaker* made the very statement he intended, and to the very persons. The mistake lay in

\* 10 C.P. 502.

thinking it to be a true and innocuous, and therefore a lawful statement; whereas in fact it was a defamatory one. In *Tompson v. Dashwood*, on the contrary, the defendant's mistake lay in the actual publication. There was no mistake as to the character of the document, nor as to the position of the respective persons for whom it was intended and to whom it was actually sent. In short, as Messrs. Clerk and Lindsell express the point in their work on Torts, in the one case the defendant, having a lawful publication to make, erroneously thought he was making that publication—in the other, the defendant made the publication ~~he~~ intended, erroneously thinking it to be lawful.

Now this is precisely what the defendants did in *Hebditch v. MacIlwaine*.<sup>\*</sup> They were ratepayers, who had a right to complain to somebody of alleged irregularities in the election of the plaintiff as a guardian. They complained, in fact, to the Board of Guardians itself; and it was held that there was no privilege for this. That is, they made the communication they intended, erroneously thinking it to be lawful. The Court of Appeal refused to say that the *bona fides* of the defendants was any ground for holding that the view of the Judge of first instance was wrong. But this, of course, merely affirms the latter part of the above proposition—the publication they intended was made by the defendants, *erroneously thinking it to be lawful*.

How far it is lawful to make a *bona fide* but negligent or unreasonable use of a privileged occasion, may be a question, and whether *Hebditch v. MacIlwaine* is consistent with the current of authority on this point may be a subject well worthy of consideration: but how the case can be said to be inconsistent with, much less to have overruled, *Tompson v. Dashwood*, which is so obviously distinguishable from it, is surprising. For in *Tompson v. Dashwood*, the

<sup>\*</sup> (1894) 2 Q.B. 54.



fact that the letter was meant for use on a privileged occasion was really not necessary to the decision.

Certainly, the reasoning in the latter case affords material for argument. It proceeds, in great part, on the ground that privilege covers a multitude of sins, rather than on the equally cogent reason that there was no intentional publication of the letter to the person who received it. Accordingly, it is, so far, obnoxious to the unfavourable comments which were passed upon it in the Court of Appeal in *Hebditch v. MacIlwaine*, and which open up the larger question of the precise extent of protection confined by the existence of privilege. But the actual decision does not appear to be in any way weakened by the subsequent case, and it is still an authority that defamatory matter must be intentionally published before the malice necessary to found liability can be presumed, and that negligent or inadvertent publication is not sufficient for this purpose.

TH. BATY.

## V.—THE DYNAMITE PLOT AND EXTRADITION.

THE announcement in the daily papers that, on the 5th October last, Kearney and Haines, rejoicing in their newly found liberty, had left Rotterdam unscathed instead of being extradited, followed by tidings, a few days afterwards, of similar good fortune to Tynan at Boulogne-sur-Mer, leads us to consider whether there must not be something altogether faulty in the administration of International justice that such escapes from trial should defile the judicial annals of the nineteenth century. The answer from the ignorant publicist, or from the red-taped official, will be that there was no power to extradite the

accused under the existing Extradition treaties. But is this so? Is a treaty really a necessity to enable a Sovereign State to extradite? Let us see.

Public jurists are divided in opinion upon the question how far a Sovereign State is obliged to deliver up a person charged with a crime committed in another country, upon the demand of that State. According to Wheaton, some writers such as Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent maintain the doctrine that under the Law of Nations every Sovereign State is obliged to refuse an asylum to an individual, accused of crime affecting the general peace and security of society, if his extradition be demanded by the State within whose jurisdiction the crime has been committed. This is known to International Law as a *perfect right*. And, according to the same authority, other writers such as Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, and Heffter, on the other hand, maintain that the extradition of fugitives from justice is a matter of *imperfect obligation* only, and *requires to be confirmed and regulated by special compacts* in order to give it the force of law. In support of this theory they point to the number of Extradition treaties which have been entered into between various States.

We are, however, of opinion that the conclusion drawn by the second class of writers is in part false. Granted that the right of Extradition be merely *imperfect*, the syllogism does not necessarily follow that Sovereign States are unable to give and take from other Sovereign States without the trammel of a treaty. There is no necessity for a treaty where goodwill and amity prevail. In fact a treaty is merely declaratory of the unwritten law, modified or augmented to suit particular circumstances. But writers on questions of law frequently do not stop to consider the truth or falsity of a statement which they enunciate; they

blindly copy the views of earlier writers, and are in their turn copied by their successors.

Extradition treaties, as we now understand them, are comparatively modern, and may be said to date from the year 1842. Some few treaties were made at earlier dates, but they are very isolated, and appear to have been made rather for the purpose of smoothing away political feeling, and for obtaining the friendly act of Extradition from a State whose amity was doubtful. There is no suggestion whatever, that the Law of Nations or International Law was wanting, nor that a State could not extradite without a treaty if it would; in fact, as we have said before, treaties of Extradition are merely declaratory of the Law of Nations, with particular modifications to suit particular circumstances.

Our proposition is well supported by the words of Mr. Justice Heath in *Mure v. Kaye* (4 Taunt. 43), who, sitting in the Common Pleas at the beginning of this century (1811), observed, "It has generally been understood, that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country against the law of which the crime was committed; and by the Comity of Nations, the country in which the criminal has been found, has aided the police of the country against which the crime was committed, in bringing the criminal to punishment. In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel, and ran away with her, and brought her into Deal, and it was a question whether we could seize them and send them to Holland, and it was held we "might." This case had for precedent the *East India Company v. Campbell*, which was tried in 1749 on the Equity side of the Court of Exchequer, the Lord Chancellor (Hardwicke) and the Chief Baron (Parker), taking part in the decision. The judgment of the whole Court was: "The Government may send a prisoner, to answer for a crime wherever committed,

that he may not involve his country, and to prevent reprisals." And in our older Reports it is laid down unhesitatingly, that by the Law of Nations, the Justice of one country, should be helping the Justice of another country. Of this our present actions on foreign judgments are a relic. But in the past, the heavy machinery now insisted on in the case of a foreign judgment, was not even suggested. Thus in *Jurado v. Gregory* (1 Vent. 32), we find it laid down that "where sentence is obtained in a foreign Admiralty (*i.e.*, the Court of Malaga, in Spain) one may libel for execution thereof here (England), because all the Courts of Admiralty in Europe are governed by the Civil Law, and are to be assistant one to another, though the matter were not originally determinable in our Court of Admiralty." The same sentiments of judicial assistance among the civilised States, are to be found in most of our older text-books; thus in 1 Rolle's Abridgment (*tit. Courts s. Admiralty* (12)), it is laid down "if a Frislander sue an Englishman in Friseland, before the Governor there, and recover a certain specified sum, but which the Englishman hath not sufficient to satisfy, and return to England; on which the said Governor orders his Letters Missive to England *omnes magistratus infra regnum Angliæ rogans* to cause execution of the said judgment, the Judge of the Admiralty in England can execute the said judgment, by imprisonment of the party, and who shall not be delivered by the Common Law, for it is by the Law of Nations that the Justice of one nation shall be helping the Justice of another nation, one to execute the judgment of the other. And the Law of England takes notice of this law, and the Judge of Admiralty is the proper magistrate for the purpose, for he alone has the execution of the Civil Law in this Realm." In this case the defendant was taken by the authority of the Judge of Admiralty, he sued out a writ of *Habeas Corpus*, but without avail, for the Court held that

the arrest was good by the Law of Nations, and according to the Common Law of this Realm. So again, if a Dutchman took up goods at the Port of London, and gave a note of hand for the payment of the same, and then fled into Holland, the vendor might apply to the Lord Mayor of London, and, upon proof of the delivery and sale of the goods, the Lord Mayor would make out a certificate of the same, and send it under the City Seal to Holland, where the authorities of Holland would execute the same upon the fugitive. But in questions of honour or life, judgments of foreign Judges were not always executed, more especially in England, because we refused to punish a man (let his offence be never so heinous) unless he were brought to punishment by a legal trial, and by the production of witnesses *vivâ voce* to his face. Nevertheless, princes, for the respect they bore each other, and for the good of Justice, although they did not in every case consent to execute or imprison one convicted in another country, yet they were accustomed to yield the natural subject to his natural prince, in order that he might meet (if found guilty) with exemplary punishment, unless the prince to whom the fugitive fled for protection had good reason to think that the latter was unjustly prosecuted; in such case he was not bound to yield him up, relying on the passage of Deuteronomy, "Thou shalt not restore to his master a bondsman who hath fled to thee." It is to be noticed that it is on the ancient doctrine, as above set forth, that the rule of Civil Law is founded, that a pirate is justiciable everywhere, no matter to what State he may belong.

Sir Edward Clarke, in his "Treatise upon the Law of Extradition," remarks, "the surrender of fugitive criminals is an International duty. . . It may not be so plainly a matter of right, that the refusal to grant it is to subject a nation to the penalty of war, but such refusal is so clearly injurious to the country which refuses, and to

the whole world, that it is a serious violation of the moral obligations which exist between civilised communities." Monsieur de Vattel (Book II., Chapter 6) says: "And since he (the Sovereign) ought not to permit his subjects to molest the subjects of another by injuring them, much less if they should audaciously offend Foreign Powers, he should oblige the culprit to repair the damage if it is possible, or punish him in an exemplary manner, or, lastly, according to the case and the circumstances, deliver him up to the offended State that justice may be executed. This is what is generally observed in the case of great crimes, which are equally contrary to the laws and to the safety of all nations. Assassins, incendiaries, and thieves, are seized everywhere, at the requisition of the Sovereign in whose land the crimes have been committed, and delivered to justice. In the case of States who have closer relations of friendship and neighbourly feelings, this courtesy extends even to the case of small offences, which are prosecuted civilly, either by payment of damages, or by a light penalty; the subjects of two adjoining States are reciprocally obliged to appear before the magistrate of the place where they are accused of the offence. On a requisition from this magistrate, which is called Letters Rogatory, they are cited to his Court, and compelled by their own magistrate to attend there."

In 1173, the Ambassadors of the Abassines, were treacherously slain by one of the Templars at Jerusalem. On demand being made to the Grand Master to deliver up the offender, he refused to do so; but on the other hand, ensured the chastisement of the offender by prescribing punishment to him, and ordering him to be handed over to the Pope.\* In the reign of Edward II. some Florentine merchants having been appointed collectors of the King's

\* *Tyrius* lib. 20, cap. 23.

customs and rents in England, Wales, Ireland, and Gascony, fled to Rome, carrying some of the money which they had collected with them. The King sent his Letters of Request to the Pope, to desire that they might be arrested, their persons and goods seized, and sent to England to satisfy the loss which he had sustained, promising nevertheless that they should not lose limb or life. The Pope seems to have acted as requested.\* Edmund de la Pool (or Pole), Earl of Suffolk, being attainted by Act of Parliament in the 12th year of Henry VII., fled to Spain; the King of Spain long refused to deliver him up, but eventually did so, on receiving the promise that the Earl should not be put to death. Napper Tandy and other political offenders in 1798, were given up by the Senate of Hamburg to the Government of George III.† In 1819, one Daniel Washburn was brought up on a *Habeas Corpus*, having been arrested for theft in Canada; Chancellor Kent held, concomitantly with our proposition, that a State was bound irrespectively of treaties to surrender fugitive criminals, and that a magistrate irrespectively of legislation in that regard, was bound to commit the accused upon proof of the commission of a crime, so as to enable either the home government to extradite the prisoner, or the foreign government to demand it.‡ In 1864, the United States delivered up one Arguelles to Spain, although there was no Extradition treaty between those countries, nor any Act of Congress relating to the same; § and in 1873 the Spanish Government delivered up one Bidwell to the British Government, there then being no treaty of Extradition between those Governments. Mr. Seward's course in the Arguelles case was supported.

\* *Rott. Romæ* n. 4 Ed. 2, m. 17 dorso.

† 27 How. State Trials 1191.

‡ 4 Johns. Ch. R. 106.

§ U.S. *Dipl. Corr.*, 1864, pt. ii., 60—74.

by him in a letter to the House Judiciary Committee, June 24th, 1864, in which the following affirmative propositions are laid down and enforced. They are as follows:—

“1. That ‘the object to be accomplished in all these cases is alike interesting to each Government, namely, the punishment of malefactors—the common enemies of every society. While the United States afford an asylum to all whom political differences at home have driven abroad, it repels malefactors, and is grateful to their Governments for undertaking their pursuit and relieving us from their intrusive presence.’ This doctrine, originally put forth by Attorney-General Cushing in an official opinion dated October 4th, 1853, was quoted and adopted by Mr. Seward.

“2. That ‘the true portion of the national obligation and authority for the extradition of criminals’ may be found ‘defined and established by the Law of Nations.’

“3. That ‘this obligation and authority under the Constitution of the United States, and *in the absence of treaty stipulations* and statutory enactments, rests with the President of the United States.’

“4. That ‘the sole elements of consideration upon which the Executive is to determine whether or not a proposed case of extradition should or should not call forth the exercise of this power and duty under the Law of Nations, and the precepts of humane and Christian civilisation,’ are ‘the traits of the alleged criminality as involving heinous guilt against the laws of universal morality, and the safety of human society, and the gravity of the consequences which will attend the exercise of the power in question or its refusal.’”

On the other hand Extradition in the absence of a treaty, has, both under the older authorities, and especially in modern times, been refused. It is evident that the right of a Government to extradite a criminal, *if it desire to do so*, fully exists, and always has existed, and that this right is the



offspring of International Comity for the benefit of civilisation and the maintenance of States. We do not espouse the dicta of those jurists who pronounce Extradition to be a *perfect right*; far from it. We do however distinctly and emphatically pronounce Extradition to be an *imperfect right*; but an imperfect right depending entirely on the will of the State, and requiring no compact, convention, or treaty to give it effect. Such is the Law of Nations at the present day. The subject has been clouded by the introduction of compacts, conventions, and treaties—agreements doubtless very useful in themselves, for the purpose of modifying the unwritten law, or for rendering the exercise of the right more easy. Events, however, have occurred, and will occur again, to show that the right of a State to extradite or to Extradition, cannot be limited to the four corners of a piece of paper, and it is time that the governments of the world should begin to realise the true effect of the Extradition treaties which they have entered into. As a statute is ancillary to the Common Law, without destroying the Common Law, so is a treaty ancillary to the Law of Nations, without destroying the Law of Nations. Let our rulers understand this, let them exercise their innate powers of Extradition, under the Comity of Nations, and let them understand that signature to treaties has not wrenched their prerogative from them. When this is better understood, we shall have no more *fiascoes*, such as have lately been witnessed on the Continent of Europe.

D.C.L.

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## VI.—THE LAW OF TREASON UNDER THE ROMAN EMPIRE.

THE conception of Treason formed by the Roman lawyers, as it appears in the titles of the Digest and the Code, has exercised considerable influence, not only upon the jurisprudence of those modern European countries that have risen upon the ruins of the Roman Empire, but upon the law of England as well. It is the object of the present article to discuss the nature of the crime of Treason under the law of the later Roman Empire, to examine the extent of its influence upon modern law, especially the law of England, and to indicate some of the principal points of difference and resemblance.

The law of Treason (*crimen læsæ majestatis*) was put upon a final statutory basis by the *lex Julia* (*temp.* Julius Cæsar), it having, according to Dr. Moyle, previously rested "partly on usage, partly on the Twelve Tables, and a *lex Cornelia*." The penalty under the *lex Julia* was *aquæ et ignis interdictio* (*v.* Cicero, *Philipp.* 1, 9 ". . . . . *legibus Cæsaris, quæ jubent ei, qui de vi, itemque ei, qui majestatis damnatus sit, aqua et igni interdici*"); though we are informed (Moyle, *Just. Inst.* 1, p. 606) that the older penalty of death was restored in the reign of Tiberius.

The *lex Julia majestatis* may be compared with the famous Statute of Treasons (25 Edw. III., c. 2). It fills the same place in Roman criminal jurisprudence as is occupied in English law by the last-named statute, and, like the Statute of Treasons, forms a sort of stock upon which a collection of imperial constitutions and decisions of lawyers—sometimes concealing their origin under the pretended authority of the statute—was grafted at a later period.

The conception of treason formed by the Roman jurists was considerably more comprehensive than that of English law. It embraced not only the more important heads of Treason, falling within the Statute of Edward III., but many others; in fact, to obtain an idea of the law under the later Roman Empire, we should read into our own Statute of Treasons the various species of constructive and statutory treason, devised by servile judges and lawyers, or enacted by equally servile Parliaments.

It is proposed in the present article to examine first the substantive Law of Treason, adverting afterwards—under the head of adjective law—to those exceptional rules of procedure which characterised prosecutions for *læsa majestas*.

*Substantive Law.*—Two preliminary observations may be made: First, both the Roman and the English law content themselves rather with an enumeration of treasonable acts, than with an adequate definition of the crime of treason itself; Ulpian (in D. 48, 4, 1, 1) says, “majestatis autem crimen illud est, quod adversus populum Romanum, vel adversus securitatem ejus committitur”; *cf.* Inst. 4, 18, 3, “lex Julia majestatis, quæ in eos, qui contra Imperatorem vel rempublicam aliquid moliti sunt, suum vigorem extendit.” These definitions, however, are so vague and inadequate as scarcely to deserve the name, and a correct idea of the nature of the crime can only be obtained from the titles of the Corpus Juris (Dig. 48, 4; Cod. 9, 8), in which it is discussed in fuller detail.

Secondly, while all varieties and degrees of treason are included under the generic term “majestas” or “*læsa majestas*,” treason of the more heinous complexion, consisting of some direct attempt upon the Emperor or the Commonwealth, was distinguished by the name of “perduellio” (D. 48, 4, 11). The laws of several modern

States (e.g., the Transvaal, the law of which has been brought into painful importance by recent events) appear to recognise a somewhat similar distinction.\*

With the distinction between perduellion and lese-majesty may be compared that drawn by modern English law between treason and treason-felony.

The crimen læsæ majestatis resolves itself into: (1) offences against the imperial person or dignity; (2) offences against the external security of the State; (3) offences against justice and the public peace. The various offences falling under these heads will now be considered.

(1) *Offences against the imperial person or dignity.*—In D. 48, 4, 6, we read that “qui statuas aut imagines Imperatoris jam consecratas conflaverint, aliudve quid simile admiserint, lege Julia majestatis tenentur.” This act appears to have been punished as a kind of constructive insult to the Emperor. We may compare Stat. 5 Eliz., c. 11, punishing as high treason “clipping, washing, rounding, or filing, for wicked gain’s sake, any of the money of this realm,” and a case cited by Lord Mackenzie, of a man being executed at Edinburgh for suspending a portrait of King James VI. from the gallows. But a man was not liable “qui statuas Imperatoris reprobatas conflaverit” (D. 48, 4, 4, 1). In D. 48, 4, 5, certain acts are declared not to be treasonable; the exceptions, on account of their trivial character, present a very ominous appearance, and throw a gloomy light on the state of the Law of Treason under the later Empire; cleaning the

\* Readers of the *Heart of Midlothian* will, perhaps, recall the distinction drawn by the learned Bartoline Saddletree when engaged in laying down the law: “Perduellion is the warst and maist virulent kind of treason, being an open convocating of the king’s lieges against his authority, and muckle warse than lese-majesty, or the concealment of a treasonable purpose.”

statues of the Emperor, when they had become old and dirty, was expressly declared not to amount to treason; moreover, a person did not commit treason by selling the as yet unconsecrated busts of the Emperor, or by throwing a stone and accidentally hitting his statue.

Mere hasty and unconsidered words were not to be construed as treasonable (D. 48, 4, 7, 3). A famous rescript of Theodosius, Arcadius, and Honorius (C. 9, 7), may be quoted in this connection; "if anyone, incapable of modesty and a stranger to shame, has thought fit to level wicked and wanton abuse against our name, and, turbulent with drunkenness, has been a traducer of our age, it is not our desire that he should be punished or suffer any harsh or severe treatment, since, if his conduct is to be attributed to levity, it only merits contempt; if to madness, it is worthy of pity; if to malice, it should be pardoned." In English law abusive words "amount only to a high misdemeanour, and no treason," though made treasonable by an Act of Henry VIII., repealed in the reign of Mary.

(2) *Offences against external security*.—The following offences (*inter alia*) amounted to treason:—Conspiring to take up arms against the Commonwealth, corresponding or holding any communication with, or giving any counsel to the enemies of the Commonwealth (D. 48, 4, 1, 1); deserting the Roman army, or going over to the enemy's army (D. 48, 4, 2); improperly surrendering a camp to the enemy, or levying war without the Emperor's authority (D. 48, 4, 3). Various other kinds of hostile or traitorous conduct are enumerated, such as leading the army of the Roman people into an ambush, or betraying it to the enemy, preventing the Roman arms from gaining a victory (*cujus dolo malo factum dicetur, quo minus hostes in potestatem populi Romani veniant*), supplying the enemy with provisions, arms, &c., exciting friendly States against

the Commonwealth\* (*utve ex amicis hostes populi Romani fiant, cujusve dolo malo factum erit, quo rex exteræ nationis populo Romano minus obtemperet*) (D. 48, 4, 4. pr.).

Conspiring to kill hostages, without the authority of the Emperor, amounted to treason (D. 48, 4, 1, 1), either because it provoked retaliation on the part of the enemy, or because it was regarded as a usurpation of the royal prerogative.

(3) *Offences against justice and the public peace.*—The following offences amounted to treason: Entering into a conspiracy "*quo armati homines cum telis lapidibusve in urbe sint, convenientve adversus rempublicam, locave occupentur vel templa, quove cœtus conventusve fiat, hominesve ad seditionem convocentur*" (D. 48, 4, 1, 1); conspiring to murder a magistrate; (*ibid.*) so under the statute of Edward III. it is treason "if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." By Stat. 7 Anne, c. 21, it is also high treason to kill any of the lords of session or lords of justiciary in Scotland, sitting in judgment. Reference may also be made to a constitution of Arcadius and Honorius, making it treason to plan the murder of members of the imperial council (*consistorium*), or of other high officers of State (C. 9, 8, 5, pr.).

It will be observed that in the constitution referred to the mental act of compassing and imagining is expressly put upon the same footing as the consummated crime; "*eadem enim severitate voluntatem sceleris, qua effectum puniri jura volnerunt*" ; indeed, this appears to have been

\* Compare the provisions of the Treason-Felony Act 11 & 12 Vict., c. 12, making it felony to stir any foreigner with force to invade this realm, or any of the Queen's Dominions.

so in all cases of treason; *cf.* C. 9, 8, 6, "from the moment of conceiving the criminal intention, he is, by virtue of the criminal conception, worthy of punishment."

Dr. Moyle is of opinion that the same principle applied to all crimes, and cites in support of his view the well-known rescript of Hadrian, "in maleficiis voluntas spectatur, non exitus" (Digest, *ad legem Corneliam*, 48, 8, 14).

It was treasonable to procure another to take an oath against the Commonwealth (D. 48, 4, 4, pr. C. 9, 8, 5, pr.), or to release from prison a person who had pleaded guilty to a criminal charge (D. 48, 4, 4, pr.); again, a person was guilty of treason who "*sciens falsum conscripsit vel recitavit in tabulis publicis*" (D. 48, 4, 2).

*Punishment.*—The penalty for treason was death and *memoriæ damnatio* (Inst. 4, 18, 3). The latter (which may be compared to, and may possibly have suggested the attainder of English law) was retrospective in its operation and involved (*a*) forfeiture of all the property of the traitor from the moment his mind first conceived the criminal design, and consequent avoidance of all intermediate sales and alienations,\* (*b*) avoidance of intermediate emancipations and other civil acts—even payments made to the criminal by a debtor were void; (*c*) "rescission of the criminal's will, and *donationes inter virum et uxorem*"; (*d*) certain disabilities imposed upon his children (*v.* C. 9, 8, 5, 6, and 8, and Moyle, Inst. Just. 1, p. 606). Under a constitution of Marcus Aurelius criminal proceedings might be instituted even after the death of the traitor, his memory branded with infamy, and his property confiscated to the *fiscus* (C. 9, 8, 6, *ib.* 7, pr. *ib.* 8 pr.).

\* So in English law attainder worked a forfeiture of all the lands of the traitor "which he had at the time of the offence committed, or at any time afterwards. . . . This forfeiture relates backwards to the time of the treason committed; so as to avoid all intermediate sales and incumbrances, but not those before the fact" (Blackstone, Comm. IV.).

Reference may also be made to the infamous constitution of Arcadius and Honorius (C. 9, 8, 5, 1); "as to the children of the traitor, to whom with imperial clemency we specially concede their lives (for they ought, by rights to perish by the same punishment as their father, in whom we have reason to dread the likeness of their father's, *i.e.*, of an ancestral crime), they are to be debarred from succeeding to their mother, their grandfather, or any other relation, or from taking under the will of a stranger; they are to be for ever beggars and paupers, the infamy of their father is ever to accompany them, they are to be incapable of attaining to any office or of taking any oath; in short, their condition is to be such, that, living in a state of squalid poverty, life may be a punishment to them, and death a consolation."

The daughters of the criminal, however, were allowed to take one fourth of what would otherwise have come to them under the will or intestacy of their mother (C. 9, 8, 5, 3). The widow of the criminal was allowed her dos and her usufruct in the *donatio propter nuptias*; the remainder was forfeited to the exchequer, after deducting a fourth of their share in favour of the daughters (C. 9, 8, 5, 5).\*

It appears from a passage in Ulpian (cited in D. 48, 4, 11) that it was only where the treason was of the more malignant species known as "*perduellio*," that proceedings could be commenced or carried on after the death of the traitor; "*plane non quisquis legis Juliae majestatis reus est, in eadem conditione est, sed qui perduellionis reus est, hostili animo adversus rempublicam vel principem animatus; ceterum si quis ex alia causa legis Juliae majestatis reus sit, morte crimine liberatur.*"

\* In English Law the wife's jointure was not forfeited for the treason of her husband; but her dower was, by virtue of Stat. 5 and 6, Edw. VI., c. 11. The dower and jointure of English law correspond to the *donatio propter nuptias* of Roman law, rather than to the dos.



No distinction was recognised between principals and accessories (C. 9, 8, 5, 6); herein the Roman and the English law agree.

*Adjective Law.*—Although the discussion of criminal procedure under the Empire is scarcely within the scope of the present article, some exceptions to the ordinary rules governing criminal prosecutions may here be noticed. In the first place, infamous persons (such *e.g.*, as those convicted in a *judicium publicum*, gladiators, actors, and pimps) could appear to accuse for treason (D. 48, 4, 7, pr.), though ordinarily debarred from prosecuting (D. 48, 2, 4). Also soldiers, “*nam qui pro pace excubant, magis magisque ad hanc accusationem admittend sunt*” (D. 48, 4, 7, 1). The slave or freedman of the traitor might appear to prosecute, or might be put to torture with the view of extorting evidence (D. 48, 4, 7, 2; C. 9, 8, 6—7, 1—8, 1). Women were good accusers and witnesses, Papinian reminding us that it was a woman named Fulvia who disclosed the conspiracy of Catiline (D. 48, 4, 8). Even the accuser might be tortured, “*si aliis manifestis indiciis accusationem suam non potuerit comprobare*” (C. 9, 8, 3), and no plea of office or rank exempted a person, whether defendant or witness, from this mode of examination; in the case of treason alone—so runs the rescript of Valentinian, Valens, and Gratian—the condition of all is the same (C. 9, 8, 4). The constitution of Arcadius and Honorius (C. 9, 8, 5, 7) promises liberal rewards to all who, “fired with the desire of true glory,” reveal a treasonable conspiracy; accomplices, if they turned “King’s evidence” received a free pardon. Even the severe penalties inflicted upon persons preferring calumnious accusations could do little to counteract the effects of an enactment, holding out so strong an inducement to perjury and extortion.

T. W. MARSHALL.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### **The Jameson Case.**

The Court in this case dealt with one or two points of interest from a purely legal point of view. In the first place, there was the question as to the effect of sect. 3 of the Foreign Enlistment Act, 1870, that “this Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the Governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act.” The Act was duly proclaimed in Cape Colony immediately after its being passed, but no specific proclamation had ever been made in British Bechuanaland or in Barralongland where Mafeking and Pitsani Pitlogo were respectively situated. It was therefore contended that these places from which the two branches of the expedition started were not subject to the Act. The Court held, however, that the Act had been indirectly “proclaimed” in the territories in question at the time of their annexation, by virtue of proclamations which had in fact been made, expressly extending to them the Law of Cape Colony. Lord Russell in his summing up said :—“Our view is that the Act may be put into operation by any means by which constitutionally the Law itself may be made the Law of the place where the Law might be applied by proclamation.”\*

Another plea raised by the defence was that Pitsani Pitlogo was not a “British Possession” at all. The

\* *Times*’ L.R. XII., p. 588.

evidence shewed that it was in the Barralong country, which had become a British "Protectorate" under a Treaty made in 1884 with the chief Montsioa. There was no express *cession* of territory, but it had ever since been administered under British authority, and Cape Law had by proclamation been applied to it. The Court directed the jury that the territory was under British dominion and the jury found this as a fact. Lord Russell made some interesting remarks upon the nature of "Protectorates," and pointed out that "the question is whether, by "whatever name it is called, the Crown exercised and "assumed by its representatives sovereign dominion and "authority."\*

As regards the application of the Act to the expedition, Lord Russell deemed that "in point of Law, it is not the "less an expedition against the dominions of a friendly "State even if it was not aimed at overthrowing the "Republic or was prompted by philanthropic or humane "motives or aimed at obtaining some reform of Law."†

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### Contraband of War.

A question of indirect interest to students of International Law arose in the case of *Nobel's Explosives Co. v. Jenkins and Co.*, 1896, 2 Q.B. 326. The plaintiffs consigned dynamite in the defendants' ship under a bill of lading by which it was to be delivered "at Yokohama or so near "thereunto as she may safely get." The bill contained the usual exception of "restraint of princes." On arrival at Hong Kong, owing to the outbreak of the war between China and Japan, the master landed the goods. In an

\* *Times'* L.R. XII., p. 590.

† *Times'* L.R. XII., p. 593. [The point suggested at p. 264 of Vol. 21 of this *Magazine* was not raised.—ED.]

action for breach of contract the Court held that the risk of the goods being seized as contraband by Chinese war-vessels amounted to a "restraint of princes," and justified the step taken by the master. "The analogy of a restraint by a blockade or an embargo," said Mathew, J., "seems to me sufficiently close. The warships of the Chinese Government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely." The present case may be compared with the familiar decisions in *The Teutonic*, L.R. 4 C.P. 171, and *Geipel v. Smith*, L.R. 7 Q.B. 404. See Halleck's *International Law*, vol. ii., p. 200.

\* \* \*

### *Private International Law.*

#### **Foreign Bankrupt.**

A curious point arose in *In re Clark; ex parte Beyer Peacock & Co. (Limited)*, *Times'* L.R. XII., p. 625. A debtor was a foreigner resident abroad when a bankruptcy notice was issued, but while on a visit to England for a few days was served with the notice. He applied to set the notice aside on the ground that he had not within the preceding twelve months ordinarily resided, or had a dwelling-house or place of business in England, and was not therefore subject to the Bankruptcy Law. The Court of Appeal held that, even assuming this to be the case, there was nothing to make the notice invalid, whatever might be the validity of a future petition or other proceedings.

\* \* \*

#### **The Lex Fori as Governing Procedure.**

Romer, J., in *In re Doetch; Matheson v. Ludwig*, 1896, W.N., p. 82, followed *Bullock v. Caird*, L.R. 10 Q.B. 276, and thus confirmed the rule laid down by Westlake in his

*Private International Law*, § 347, that "when, by the proper Law of a contract made with an unincorporated firm, each partner in that firm may be liable on it *in solidum* by some mode of procedure or other, the *lex fori* determines whether any partner may be sued individually before the others have been sued."

The recent case was one in which the plaintiffs were creditors of a firm in which the partners were S. and D. carrying on business in Spain. D. died in England leaving property here, and appointing executors resident here. The plaintiffs and other joint creditors of the firm claimed administration of D.'s estate and payment thereout of the joint debts of the firm. It was pleaded in the defence that the rights of the plaintiffs were governed by the law of Spain, under which the joint creditors were not entitled to payment out of the separate estate of a deceased partner until they had exhausted the property of the firm. The Court held that the defence was bad, as the plea simply stated a matter of procedure which was a question determinable by the *lex fori*. Dicey, in his new work on *The Conflict of Laws*, does not appear to specifically deal with this point. The principle, however, practically results from his Rules 178 and 188. See particularly pp. 674, 675. Compare the case of *Re Kloebe*, 28 Ch. D. 175.

JOHN M. GOVER.

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## VIII.—NOTES ON RECENT CASES (ENGLISH).

## Company Votes. In Person or by Proxy?

**A**N interesting question in connection with company matters is as to whether a proxy holder can vote for self and proxy on a show of hands. The general opinion is that holders of proxies ought certainly to be able to vote for the giver on a show of hands. In the case *Re Horbury Bridge Coal, Iron, and Wagon Co.* (11 Ch. D. 109), it was laid down that at a meeting the proper way of ascertaining the votes was by show of hands, and, inasmuch, as shareholders represented by proxy could not show their hands, therefore, proxies could not be counted when votes were taken by show of hands. This view seems, however, open to doubt. In *Re Caloric Engine and Syren Fog Signals Co.* (52 L.T.N.S. 846) it was held that on the show of hands each shareholder must count as one person, without regard to the number of proxies he has. In *Re Bidwell Brothers* [1893] 1 Ch. 603 it was considered, that at a meeting of the shareholders of a company, where the articles permitted voting by proxy, even though no poll was asked for, the chairman, in order to find out the number of votes given, must include the vote of each person who has named a proxy, not, however, according to the number of shares held by him, but as one vote. In the case of *Ernest v. Loma Gold Mines, Limited* (101 L.T. Journ. 327), the decision of *Re Bidwell Brothers* was not followed. For it was held that in voting by show of hands, proxies do not count. According to *Reg. v. Government Stock Investment Co.* (3 Q.B.D. 442) proxy holders cannot demand a poll. The holders of twenty shares can carry a resolution, notwithstanding the objection of the holders of 200 shares, unless at least five of those holders are present in person. Another case

bearing on votes and proxies is *Re Belcher's Patent Smoke Preventer Company, Limited* (21 "The Accountant," p. 1028), where it was held that proxies should be counted on a show of hands. In that case, it appeared that the directors had given notice of an extraordinary general meeting to pass a special resolution, and the question arose, which had to be decided by Mr. Justice Kekewich, was whether or not the resolution had been lawfully passed by the requisite majority of three-fourths. According to the Articles of Association, three persons present, either in person or by proxy, were to form a quorum at general meetings of the company. Here, only four persons were present, though the directors had proxies for nine other persons. It was contended for the directors that two members personally present and the nine proxies had voted for the resolution, as against two persons personally present who voted against it. On the other hand, it was argued that proxies could not be counted unless a poll was demanded. Mr. Justice Kekewich held that the chairman was entitled to record the votes, not only of those present in person, but also those present by proxy. These divergent decisions with regard to the question of proxies and votes can only be overcome by a proper clause being introduced into the Articles of Association of each company. Such contradictory judgments as these, though it must be assumed that there were some distinctive differences in each case for such divergent decisions to be given, remind one of the case of the sovereign and the shilling. One man had given another a sovereign under the impression that it was a shilling. The receiver, likewise, had the idea that it was a shilling, but subsequently finding out that it was a sovereign, spent it all. The question arose had there been larceny. A court of fourteen judges discussed the point, and the judgments curiously enough were alternately one in favour of the conviction, and the

next against, with the result that seven were for and seven against the conviction. The prisoner had been sentenced by the lower court to hard labour, and as the views of the higher court were equally divided, the sentence stood.

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#### A Partnership Point.

The meaning of sect. 2 of the Partnership Act, 1890 (containing the repealed Bovill's Act), was discussed in the case of *Re Young ; ex parte Lloyd Jones*. There it was laid down that the receipt of a sum of money, payable contingently on profits, was a receipt of a share of profits sufficient to cause a *prima facie* partnership between payer and payee. The point was whether the payment of a fixed weekly sum out of the profits of a business was equivalent to "receiving a share of the profits" within the meaning of the Partnership Act, 1890, so as to fix the fact that the person so receiving was a partner. According to an agreement between Young and Jones the latter was entitled to draw out of the profits of the business specified a weekly sum for such services and, at the end of a term of months, have the option of entering into partnership with Young. Jones paid into the banking account in his own name a sum of £500 to be treated as an advance of capital to the business, and this was to be used under the sole superintendence and control of Jones in defraying the trade business debts, and in discharging the current business liabilities during the continuance of the agreement, and he was to receive out of the profits of the business during the continuance of the agreement for the use of such loan a certain weekly sum. The option was never exercised, but the weekly payments were afterwards reduced. On the bankruptcy of Young his trustee rejected the proof of Jones for £663 on the ground of Jones being a partner, and Mr. Justice Vaughan Williams held that the rejection was



right. Jones was entitled to a payment contingent on or varying with the profits of the business, and the receipt of such a payment was *prima facie* evidence that Jones was a partner in the business. It was not, however, the intention of the parties to the agreement that there should be any partnership until Jones exercised the option given by him by the agreement of becoming partner. The £500 paid into the banking account by Jones was held to be a loan to Young, and it was paid in on a contract under which Jones was to receive a share of the profits. A contract that a person shall receive a fixed amount out of the profits is equivalent to a contract that he shall receive a share of the profits. An agreement for the receipt of a fixed sum out of the profits is an agreement for the receipt of a share of the profits.

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#### Trustees' Investments and Depreciation.

A decision which somewhat clears the path of those willing to fulfil the arduous duties of trustees was that of *Re Chapman; Cocks v. Chapman*. There the testator had died in 1880, and part of his estate comprised mortgages on agricultural land, the value of which was falling. Looking at this impending depreciation the trustees took advice as to whether they should hold on, until the apparently temporary depression passed away, or get rid of the estate, and the advice given was to hold on. No improvement, however, resulted, and the trustees were sued for the loss incurred by the beneficiaries under the testator's will. The Divisional Court held that the trustees were liable, following in this case the old practice on the subject. The Court of Appeal, however, reversed this decision, and held that the trustees had only committed an error of judgment such as any one might commit. The evidence shewed that agricultural and other experts would have acted in exactly

the same way under the same circumstances, and, therefore, there was no ground for suggesting that there had been any carelessness or neglect on the part of the trustees. The result of the decision, therefore, indicates that it is not actually necessary for an executor to realise his mortgage securities, unless the immediate distribution of the estate is in prospect. When a good mortgage security, in which the testator's property is invested, drops in value, this is not in itself any reason for accusing the trustees of breach of trust for not realising at the best time. As Lord Justice Lindley pointed out, there is no rule which compels the Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorised security in a falling market if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties. Since this decision has been given, there has been passed the Judicial Trustees Act, 1896 (59 & 60 Vic., c. 35), under which, if it appears to the Court that a trustee is, or may be, personally liable for any breach of trust, but has acted honestly and reasonably, and ought to be fairly excused for the breach of trust and for omitting to obtain the directions of the Court, the Court may relieve the trustee either wholly or partly from personal liability for the same. This clause is now in force, and legal opinion seems to consider that it is in defiance of all usual equity rules, inasmuch as it makes the more innocent (the *cestui que trust*) of two innocent persons suffer.

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#### Preference Shareholders and their Shares.

The decision in *Andrews v. Gas Meter Company* shews that it should be made clear whether articles can be altered by special resolution so as to allow of the issue of new preference shares. The memorandum of association of a limited company gave power to increase capital as provided by

the articles of association. The original articles had no provisions authorising the raising of preference capital, nor as to the priority of different classes of shares. The articles were altered so as to allow of the raising of preference shares, but the Court held that the preference shares were issued *ultra vires*. It appeared that the company for thirty years paid a preferential dividend of 5 per cent. to the holders of the preference shares. The ordinary shareholders had received considerably more in the shape of dividends, but, nevertheless, there was a large surplus available for distribution. The question then arose as to the validity of the preference shares, and as to the right of the preference shareholders to participate in the distribution. Following the decision of *Hutton v. Scarborough Cliff Hotel Co.* (4 De Gex Jones and Smith), the Court said the company had no right to issue the preference shares, and, moreover, the holders of such shares could not be recognised as shareholders of the company. The only benefit these unfortunate shareholders got, was to have their money returned to them. There have been some other decisions in conflict with *Hutton v. Scarborough Cliff Hotel Co.* *supra*, e.g., *British Corporation v. Cowper* [1894] A.C. 399, but this decision was not followed.

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#### Transfers, Calls, and Contributories.

According to the decision in *Re National Bank of Wales* it would seem to be very imprudent to transfer shares during liquidation, unless the transferee is perfectly solvent. In this case the company was in voluntary liquidation. A shareholder, T., after the liquidation transferred his shares and the transferee transferred them to a third person, and all this was done with the liquidator's assent. A necessity for making calls arising, the question occurred if T. could be placed on the list as a contributory, and the Court held

that he could, but that the subsequent transferees were not contributories, nevertheless, it was considered that T. should be indemnified by his transferee, and the latter must be indemnified by his transferee (the third person). Any surplus would then be divided between the transferor T. and the last transferee. Mr. Justice Vaughan Williams pointed out that although a transferee, with the liquidator's consent, had certain rights, such as the right to share in any surplus, the consent of the liquidator did not affect the status of the transferor so as to free him from liability as a contributory. If that could be done, it must be by some order of the Court. Under sect. 153 of the Companies Act, 1862, the Court could say the change of status should not be void in a compulsory winding-up or a voluntary winding-up continued under supervision. If it could be done in a voluntary winding-up under supervision, it must be competent to the Court to do it in a voluntary winding-up without supervision. The status of T. was not affected by the liquidator's assent to the transfers, so as to absolve him from liability for calls on shares. Generally, it is of advantage to companies in voluntary liquidation not to allow transfers, except in cases where it is intended to transfer from a poor man to a rich man.

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#### **Change of Name of Registered Trade Mark Proprietor.**

Owners of trade marks will be satisfied with a recent decision. In this case the comptroller of Trade Marks, acting in conformance with the decision of a Divisional Court in the case of *Re New Ormonde Cycle Co.*, had altered the register of trade marks by substituting for the name of the "St. Andrews Cycle Company, Limited," the name of the "New Ormonde Cycle Company, Limited." The comptroller had desired that the alteration should be made, and thought it would be better done without application to

the Court. The case, however, was not met by the Rules under nor by the Trade Mark Acts, no actual provision being made for the alteration in the register in the name of the owner of the trade mark, though means were given for the assignment of a trade mark to another person. Mr. Justice North, however, came to the conclusion that the alteration could be made under sect. 87 of the Patents, Designs, and Trade Marks Act, 1883, and gave the comptroller power to make the alteration in the register. If a company which is proprietor of a trade mark changes its name, the new name should appear on the register; and if a lady proprietor of trade mark changes her name on marriage, her married name should appear there; as it is clear that the object of the statute is that the present name of the proprietor of a trade mark should appear on the register. Change of name, although voluntary, may come within the words "operation of law" as set out in sect. 87, and when a change of name is duly effected, it is the duty of the proprietor to apply to the comptroller to make the corresponding alteration in the register. The cases *Re The National Wholesale Tea Supply Association, Limited* (10 Rep. Pat. C. 164), as dealing with sect. 92, and *Re The Patent Plumbago Crucible Company's Trade Mark* (7 Rep. Pat. C. 282), as touching on sect. 90 were quoted, but they did not deal exactly with the point in question. This case *Re New Ormonde Cycle Company, Limited*, is the first one in which the point as to the change of name of the registered proprietor and the insertion in the register of the new name in the place of the old one, has been argued and settled.

T. F. UTTLEY.

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## Books Received.

*Taswell-Langmead's English Constitutional History.* Fifth Edition. By Philip A. Ashworth. Stevens and Haynes, London, 1896.

*Harris's Principles of the Criminal Law.* Seventh Edition. By Charles L. Attenborough. Stevens and Haynes, London, 1896.

*Tristram and Coote's Probate Practice.* Twelfth Edition. By Thomas Hutchinson Tristram, Q.C., D.C.L., and Henry A. Jenner. Butterworth and Co., London, 1896.

*Lyon and Redman's Law of Bills of Sale.* Fourth Edition. By J. H. Redman. Reeves and Turner, London, 1896.

*Cardinal Rules of Legal Interpretation.* Collected by Edward Beal, B.A. Stevens and Sons, Ltd., London, 1896.

*The Jewish Law of Divorce.* By David Werner Amram, M.A., LL.B. Edward Stern and Co., Philadelphia, 1896.

*A First Book of Jurisprudence.* By Sir Frederick Pollock, Bart. Macmillan and Co., Ltd., London and New York, 1896.

*A Preliminary Treatise on Evidence at the Common Law.* Part I. By James Bradley Thayer. Little, Brown and Co., Boston, 1896.

*A Tabular Précis of Military Law.* By Captain A. D. Furse. Macmillan and Co., Ltd. London and New York, 1896.

*The Institutions of Italy.* By John P. Coldstream. Arch. Constable and Co., Westminster, 1896.

*Crooke James's Curiosities of Law and Lawyers.* New Edition. Sampson Low, Marston, and Co., Ltd., London, 1896.

*Cassell's Family Lawyer.* Part I. Cassell and Company, Ltd., London, Paris, and Melbourne, 1896.

*Emmet's Notes on Perusing Titles.* Second Edition. Jordan and Sons, Ltd., 1896.

*Principes du Droit des Gens.* By Alphonse Rivier. Rousseau, Paris, 1896.

## Reviews.

*Taswell-Langmead's English Constitutional History, from the Teutonic Conquest to the Present Time.* Fifth Edition. Revised throughout with Notes by PHILIP A. ASHWORTH of the Inner Temple, Barrister-at-Law. London: Stevens and Haynes. 1896.

The death of Mr. C. H. E. Carmichael, M.A., in March, 1895, the talented editor of a work written by his former colleague and college companion, Professor Taswell-Langmead, had left it unprovided with a foster parent to direct its course and

progress. The publishers, as we learn from the Preface to this edition, have entrusted Mr. Ashworth, a pupil of Professor von Gneist, with the honour and responsibility of editing this valuable book, who, whilst leaving the original text of the author untouched, has deemed it desirable to cancel several purely historical notes of Mr. Carmichael, together with his Appendix ; but on the other hand, Mr. Ashworth has added an appendage to the text at the end, briefly reviewing the more recent legislative enactments, as they affect the development of the Constitution. The result of this is that the new edition is less in volume, in respect both of matter and bulk. This undoubtedly has its advantages for the student, but we miss the long and valuable notes, which the genius of Mr. Carmichael delighted to impart to his reader whenever a cognate subject in the text offered an occasion. The loving care of Mr. Carmichael is missing ; but Mr. Ashworth had undoubtedly right on his side when he eliminated these interesting and learned notes from a work on English Constitutional History. It is but perfuming the rose and gilding the lily to praise Taswell-Langmead's work—a work universally recognized as the leading text-book on the subject in modern times, and which the new editor appears to have collated with success, and to have brought successfully down to date. We should, however, remark that at page 157, with regard to the institution of Coroners, he permits the statement to continue, that that officer was first created in 1194, neglecting to acquaint the reader that the researches of Dr. Charles Gross, published in *Select Cases from the Coroners' Rolls* by the Selden Society, throw much doubt on the above statement, and suggest that Coroners existed long before the date in question ; for example, the citizens of Norwich claim to have appointed such officers in the reign of Stephen.

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*Cooté's Common Form Practice and Tristram's Contentious Practice of the High Court of Justice in granting Probates and Administrations.* Twelfth Edition. By THOMAS HUTCHINSON TRISTRAM, Q.C., D.C.L. The Common Form portion revised by HENRY A. JENNER, Chief Clerk, Personal Application Department, Principal Probate Registry, Somerset. London : Butterworth and Co. 1896.

\* The Finance Acts of 1894 and 1896, together with the Colonial Probate Act of 1892, and the late decisions on the Contentions

and Common Form Practice, have necessitated a new edition of this well-known work. Dr. Tristram has had a difficult and responsible task in his revision of the work, and we unhesitatingly pronounce the present edition to be a success. Those who are unaccustomed to the difficulties of Probate and Administration, can hardly realize the labour which has been expended on these pages. The work may roughly be divided into four parts: first, the Practice in Common Form on granting Probates and Administrations; secondly, the Common Form Practice on Motions and Summonses; thirdly, Contentious business; and fourthly, an Appendix containing the Statutes relating to the subject from 1837 to the present year, Rules, Forms, and Orders for the Principal Registry, Probate and Administration Duties, Forms used in the Probate Division, Bills of Costs, Rules and Fees. It is interesting to note that the conditions, under which the practice called *Common Form* was formed and founded, were first set forth in *The Law Magazine* (1855), Vol. LIII., p. 1, and Vol. LIV., p. 110, and in *The Law Magazine and Review* (1856), Vol. I., p. 252.

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*Harris's Principles of the Criminal Law.* Seventh Edition. By CHARLES L. ATTENBOROUGH, of the Inner Temple and of the Midland Circuit, Barrister-at-Law. London: Stevens and Haynes. 1896.

The seventh edition of this well-known work requires little notice. Since the present editor has had the book in hand, it has been carefully and successfully edited; we find an entire absence of those unfortunate blunders to which we drew attention when we reviewed the edition of the previous editor. The Prevention of Cruelty to Children Act, 1894, the Summary Jurisdiction (Married Women) Act, 1895, and parts of the Sale of Goods Act, 1893, referring to the restitution of stolen goods have been added in their proper places, and in all other respects the work has been carefully annotated up to date, save, we notice at p. 301, respecting the University Court at Cambridge, that the statute passed in 1894 (57 and 58 Vict., c. lx.) to amend the law relating to the jurisdiction of the authorities of that University is not quoted. But since the omission depends on the inadvertence of the editor to a Local Act only, the fault is very excusable.



*A First Book of Jurisprudence for Students in the Common Law.* By Sir FREDERICK POLLOCK, Bart., Barrister-at-Law, M.A. London and New York: Macmillan and Co. 1896.

This book is designed for those students who intend to enter upon the study of the Common Law, that is to say, for those who propose to become *lawyers* in the true sense of the word. It is useless to men who set out with the design of becoming solicitors, whose faith is bound up between the four corners of an Act of Parliament, Rules of the Supreme Court Practice, and Bills of Costs. Nor is it intended for those aspirants to the Bar, whose minds do not rise above practice in Criminal Courts, or the patrimony of family briefs. It is intended for the University man, who desires to acquaint himself with the *principles* of Law, as introductory to plunging hereafter into the deep waters of Jurisprudence. The book is academic. It discusses the nature and meaning of law, the subject-matter of law, claims of persons on persons, relation of obligations to property, sources of English law, case law and precedents, *et similia*. It is a useful work, and pleasant reading.

*A Preliminary Treatise on Evidence at the Common Law.* Part I. Development on Trial by Jury. By JAMES BRADLEY THAYER, Weld Professor of Law, Harvard University. Boston: Little, Brown & Co. 1896.

This is the first part of an interesting work; it deals with the older modes of trial, including Trial by Oath, by Ordeal, and by Battle; then Trial by Jury and its developments to the present day. Written by an American jurist, we have the advantage of the history of trials, both in the United States and in our own country. It will be a surprise to many to hear of *compurgators* in our courts as late as 1824; such form of trial being abolished in 1833, while ordeal appears to have died out as early as 1214. It was forbidden by the Fourth Lateran Council in the following year; Henry III. informing his judges *cum prohibitum sit per Ecclesiarum Romanam judicium ignis et aquæ*.

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*The Jewish Law of Divorce according to Bible and Talmud with some references to its development in Post-Talmudic times.* By DAVID

WERNER AMRAM, M.A., LL.B., Member of the Philadelphia Bar. Philadelphia: Edward Stern & Co., Inc. 1896.

The author tells us that in 1888 a clergyman of the Protestant Episcopal Church, was tried in the Ecclesiastical Court of the Diocese of Pennsylvania, his chief offence being his second marriage after he had been divorced from his first wife because of her desertion, a ground of divorce not recognized by the Church. This led the writer to enquire into the Jewish law, for the purpose of understanding the relation of the two dissimilar texts, Deuteronomy xxiv., 1—4, and Matthew xix., 3—9. It is unnecessary to say that the work is most interesting, while the references to the Talmud throw a strong side-light of explanation on the Biblical text.

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*The Institutions of Italy.* By J. P. COLDSTREAM, Writer to the Signet. Westminster: Arch. Constable & Co. 1896.

In about 150 small pages the author has given us a concise exposition of the government, courts of justice, laws, religion, commerce, and trade of Italy. With regard to land, he tells us, that there is no law of entail, and every owner can deal with land as he desires by testament, donation, or sale; that there is a well kept Register of Land Rights, in which the description and extent of every estate in land is recorded, and every deed of transfer or mortgage is required to be recorded in this Register. The book will well repay an attentive perusal.

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*Lyon and Redman's Law of Bills of Sale.* Fourth Edition. By JOSEPH HAWORTH REDMAN, of the Middle Temple, Barrister-at-Law. London: Reeves and Turner. 1896.

The fact that this work has again passed into another edition is of itself evidence of the favour with which it is received by the profession. The editor says, and with truth, that the death of his former colleague in the work, Mr. Lyon, has thrown the entire responsibility on his shoulders. We are glad to find that he has adequately supplied the additions which new modifications of the law of Bills of Sale had rendered necessary. There is no doubt but that the jurisprudence on this subject is difficult; few counsel, and fewer solicitors still, understand anything about it. It is therefore a great *desideratum* for practitioners in the Law to have the means of obtaining so readily information, at once concisely explained and so trustworthy.

*A Tabular Précis of Military Law, with Explanatory Notes.* By Captain A. D. FURSE, late 2nd W. I. Regiment. London: Macmillan & Co., Ltd. 1896.

The author of this work has, as he tells us, compiled it for the use of candidates for the military examinations, and has derived a large volume of his information from the Official Manual of Military Law, as well as from Army Orders and the Queen's Regulations. As a mere handbook for military men, or for students at an Academy we do not object to it; it consists of some 40 tables, affording, by way of synopsis, a bird's-eye view of a particular subject, such as Summary of Evidence, Military Procedure, Courts Martial, etc. These tables are compiled with considerable skill, and evince care and much painstaking. They are adequately suited for the purpose for which they are intended; but it must not be supposed by the legal practitioner, that the deep waters of Martial or of Military Law have been entered into.

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"*Temple Bar*" Magazine, of last August, contains a sketch of Lord Bramwell by John Macdonell, one of the Masters of the High Court of Justice; an article full of interest, and recalling to those, old enough to recollect them, the halcyon days of the Common Law Procedure Act.

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Among periodicals we notice: *The University Law Review*, of New York; *The American Law Review*, of St. Louis, Mo.; *The Harvard Law Review*; *The Chicago Legal News*; *The Law Book News*, of St. Paul, Minn.; *The National Corporation Reporter*, of Chicago; *The American Law Register and Review*; *The Canadian Law Times*; *The Western Law Times*, of Canada; *The Madras Law Journal*; *The Law Times*, London; *The Law Journal*, London; *Bulletin Mensuel de la Société de Législation Comparée*; *Annuaire de Législation Française*; *Annuaire de Législation Etrangère*, Paris; *Journal du Droit International Privé*; *La Revue Générale*; *Revue Bibliographique Belge*; *Case and Comment*, Rochester, N.Y.; *La Giustizia Penale*, Rome.

# Quarterly Digest

OF

## ALL REPORTED CASES,

IN THE

**Law Times AND Law Reports** FOR END OF MAY AND  
FOR JUNE, JULY, AUGUST AND SEPTEMBER.

By THOMAS J. BARNES, of the Middle Temple,  
Barrister-at-Law.

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- Whittaker *v. Scarborough Post Newspaper Co.* (L.R. [1896] 2 Q.B. 148; 74 L.T. 553), 22, iii.
- Whitwham *v. Westminster Brymbo Coal and Coke Co.* (L.R. [1896] 1 Ch. 894; 74 L.T. 405 and 804), 32, vi.
- Willesden Local Board *v. Wright* (75 L.T. 13), 16, iv.
- Williams *v. Williams and Pocock* (L.R. [1896] P. 153), 11, vi.
- Willson and Another *v. Love and Others* (L.R. [1896] 1 Q.B. 626; 74 L.T. 590), 15, iv.
- Wilmot *v. Alton* (L.R. [1896] 2 Q.B. 254; 74 L.T. 813), 4, i.
- Winstanley, *the* (74 L.T. 482 and 75 L.T. 133), 29, vi.
- Wood, *re*; *Attorney - General v. Anderson* (L.R. [1896] 2 Ch. 596; 75 L.T. 28), 12, ii.
- YOUNG *v. SOUTH AFRICAN AND AUSTRALIAN EXPLORATION AND DEVELOPMENT SYNDICATE* (L.R. [1896] 2 Ch. 268; 74 L.T. 527), 7, iv.



# DIGEST.

## Administration:—

- (i.) **C. D.**—*Breach of Covenant to Pay Money—Indemnity—Right of Administrator to Retain.*—A life tenant and a remainderman joined in a mortgage to secure an advance to the former who covenanted to pay all moneys falling due under the mortgage, and to keep the remainderman indemnified. The life tenant died without having paid off any part of the principal. The remainderman took out administration, and was held entitled to retain in respect of the life tenant's breach of covenant.—*In re Allen; Adcock v. Evans*, L.R. [1896] 2 Ch. 845; 75 L.T. 136.
- (ii.) **C. D.**—*Deposit by Testator as Security for Sons—Legacy to Sons—Bankruptcy of Sons—Appropriation of Deposit—Claims on Sons' Interest under Will.*—A testator deposited with a bank a sum of money as security for an advance to his sons, and by his will he made a bequest to each son. The sons became bankrupt, indebted to the bank a sum much in excess of the deposit. Held, that the trustees of the will were not entitled to retain the sons' interest under it, to recoup the testator's estate the loss of the deposit with the bank.—*Lee v. Binns; in re Binns*, L.R. [1896] 2 Ch. 584; 75 L.T. 99.
- (iii.) **C. D.**—*Assets—Mortgage—Equitable Charge by Sole Executor and Legatee—Unsatisfied Creditors—Priorities.*—If an executor who is also residuary legatee parts by sale or mortgage for valuable consideration with the control of the testator's assets to a person who has no notice of any ground which rendered it improper for the executor so to deal with them, and who, if his title is equitable only, has given the proper notice, this person's purchase or mortgage is valid against any unsatisfied creditor of the testator.—*Graham v. Drummond*, L.R. [1896] 1 Ch. 968; 74 L.T. 417.
- (iv.) **P. D.**—*Intestates Estates Act, 1890, s. 1—Court of Probate Act, 1857, s. 73—Grant to Executor of Widow who had not taken Administration.*—The Court, under sect. 73 of the Probate Act, 1857, granted administration to the executor of a widow who died without having administered to her husband's estate, which was of the net value of less than £500.—*In the goods of Bryant*, L.R. [1896] P. 159.
- (v.) **P. D.**—*Intestacy of Married Woman—Husband a Bankrupt—Estate under £30—Grant to Official Receiver—Citation and Sureties dispensed with—Bankruptcy Act, 1883, s. 121.* (*In the goods of Jane Turner, deceased, see 12 P.D. 18, followed.*)—Where the husband of a deceased intestate was an undischarged bankrupt, the Court made a grant of her personal estate to the official receiver, and on account of the smallness of the estate dispensed with citation of the husband and accepted the administrator's personal bond.—*In the goods of Sarah Jane Conolly*, 74 L.T. 461.
- (vi.) **C. A.**—*Statute Barred Debt Due to Administrator—Right of Retainer—Payment out of Court Claimed.*—In the presence of the administrator of the estate of a deceased insolvent who had been liable to the administrator for a debt now statute barred, an order was made carrying over a fund of the deceased to a separate account and directing enquiry for persons beneficially interested. On the death of the administrator his personal representative took out letters of administration *de bonis non* to the insolvent estate and claimed to have the fund paid out to her. The Court refused to comply, as the object of

the claim was to acquire a right of retainer which would defeat the purpose of the enquiry directed.—*Trevor v. Hutchins*, L.R. [1896] 1 Ch. 844; 74 L.T. 470.

- (i.) **P. D.**—*Probate—Administration with Will Annexed—Foreign Domicil.*—Where a testatrix with a French domicile executed under a power of appointment a will in English form the Court granted administration with the will annexed.—*In the goods of Huber*, L.R. [1896] P. 209.

### Adulteration:—

- (ii.) **Q. B. D.**—*Abstraction of Cream from Milk—Disclosure under sect. 9 of Sale of Food and Drugs Act, 1875.*—Milk was sold in a glass on which was engraved, "Not guaranteed new or pure milk, or with all its cream. See notice." The notice stated that every precaution was taken to ensure the excellence of the milk supplied, but that to meet the requirements of the Act, the quality was not guaranteed. *Held*, that the notice was a "disclosure of the alteration," and the vendor was not liable for abstraction of any part of the article of food sold.—*Spiers and Pond v. Barrett*, L.R. [1896] 2 Q.B. 65; 74 L.T. 697.
- (iii.) **Q. B. D.**—*Place where Offence Committed—Jurisdiction of Magistrate—Sale of Food and Drugs Act, 1875, ss. 6, 20, 27.*—Where the sale and delivery and the giving of a warranty in respect of milk all took place outside the limits of jurisdiction of a Metropolitan magistrate, the submission to the public analyst of a sample obtained within the limits will not give jurisdiction to the magistrate to hear the information against a defendant of having given a false warranty with respect to milk sold and delivered by him.—*Reg. v. Horace Smith*, L.R. [1896] 1 Q.B. 596; 74 L.T. 340.

### Animal:—

- (iv.) **C. A.**—*Bite of Dog—Scienter.*—In an action for injury from a dog bite, evidence must shew that the owner of the dog knew that he was disposed to bite mankind; not merely that the dog had previously bitten sheep or cattle.—*Osborne v. Chocqueel*, L.R. [1896] 2 Q.B. 109; 74 L.T. 786.

### Apportionment:—

- (v.) **Ch. D.**—*Tenant for Life and Remainderman—Sale by Order of Court—Rights of Personal Representative of Life Tenant—Apportionment Act, 1870, ss. 2, 3, 4, 5.*—On the death of a person entitled for life to the dividend on stocks, trustees were to pay transfer and assign the stocks to certain beneficiaries. The life tenant died in the middle of a half-year. In the absence of her representatives, an order of the Court was made for the sale of the stocks. Some dividend for the half-year, in which the tenant for life died, was paid to the trustees before the sale was effected. Some stocks were sold cum dividend. *Held*, that under sect. 5 of the Act the personal representative of the life tenant was entitled to a proportion of the dividend which actually came into the hands of the trustees. That as the Act would also have applied to the stocks sold cum dividend if the trustees had transferred them in specie to the beneficiaries, the personal representatives were entitled to stand in a position as good as if this course had been adopted.—*Bulkeley v. Stephens*, L.R. [1896] 2 Ch. 241; 74 L.T. 409.

### Arbitration:—

- (vi.) **Q. B. D.**—*Reference to Three Arbitrators—Not Unanimous.*—Where a dispute is referred to the decision of three arbitrators, an award by two

of them, in which the third does not concur,\* is invalid.—*United Kingdom Mutual Steamship Assurance Association v. Houston & Co.*, L.R. [1896] 1 Q.B. 567.

- (i.) **Q. B. D.**—*Umpire giving Evidence on other matter for one Party—Bias—Lands Clauses Consolidation Act.*—The fact that an umpire has, during the course of an arbitration, given evidence for one of the parties in another similar case is not necessarily an objection to the award on the ground of bias.—*An Arbitration between Haigh and the London and North-Western Railway and the Great Western Railway Companies*, L.R. [1896] 1 Q.B. 649; 74 L.T. 655.

**Assessment:—**

- (ii.) **C. A.**—*Valuation List—Appeal—Clerk of Assessment Committee—Right of Audience—Valuation (Metropolis) Act, 1869, s. 62.*—The clerk of an assessment committee has no right to be heard in their behalf in consent on appeal against a valuation list.—*Reg. (on the prosecution of Dewey) v. Justices of London*, L.R. [1896] 1 Q.B. 659; 74 L.T. 523.

**Bankruptcy:—**

- (iii.) **Q. B. D.**—*Act of Bankruptcy—Bankruptcy Act, 1883, s. 4, sub-s. 1 (h).*—A letter sent to a creditor by the solicitor of the debtor on the following terms: "We send you herewith a statement shewing the income and expenditure and the amount of the mortgages on the estate. We think it well to repeat what we stated to you at our interview that a receiving order will be applied for immediately execution is issued," was held not to be an act of bankruptcy within sect. 4, sub-sect. 1 (h) of the Act.—*The Trustee of Viscount Hill (deceased), a Bankrupt v. Rowlands*, L.R. [1896] 2 Q.B. 124; 74 L.T. 556.
- (iv.) **Q. B. D.**—*Bankruptcy Act, 1883, s. 6, sub-s. 1—Right to present Petition.*—A bill of exchange was given for money lent and interest, and was renewed by agreement after interest on the first had been paid. Before the renewal became due, the acceptor committed an act of bankruptcy. Held, that the original debt was "a liquidated sum payable either immediately or at some certain future time," and that the creditor was entitled to present a bankruptcy petition.—*In re Barr; e. p. Wolfe*, L.R. [1896] 1 Q.B. 616; 74 L.T. 555.
- (v.) **Q. B. D.**—*An Act of Bankruptcy by a Non-trader—Bankruptcy Act, 1883, s. 4, sub-s. 1 (h).*—A verbal statement to a creditor by a non-trading debtor that he is unable to pay his debts and that he will deal with all his creditors in a body may constitute an act of bankruptcy.—*In re Scott; e. p. Lewis*, L.R. [1896] 1 Q.B. 619; 74 L.T. 555.
- (vi.) **Ch. D.**—*Composition—Default—Mortgagee's Remedy—Bankruptcy Acts, 1883, ss. 18 (11), 108; 1890, s. 3 (15); rr. 211 of 1886 and 83 of 1890.*—On the death of debtor after making default in a composition with his creditors, a mortgagee can proceed, under the above sections and rules, to have the debtor adjudicated a bankrupt.—*In re Hardy; Hardy v. Farmer*, L.R. [1896] 1 Ch. 904; 74 L.T. 403.
- (vii.) **Q. B. D.**—*Guarantee to Bank for Whole Debt to Limited Amount—Rights of Bank.*—When a surety guarantees the whole debt which may arise, but yet limits his liability to a fixed sum, the creditor may prove for the entire claim, although he has received the maximum, but lesser sum, of the guarantee, and the surety has no right of proof till the debt has been paid in full.—*In re Sass; e. p. National Provincial Bank of England*, L.R. [1896] 2 Q.B. 12; 74 L.T. 388.

- (i.) **Q. B. D.**—*Mortgage of Future Payments—Bankruptcy of Mortgagor—Rights of Trustee—Bankruptcy Act, 1883.*—X. entered into a contract in consideration of a weekly payment to supply goods and to keep them in repair for a certain number of weeks. After the goods were supplied X. mortgaged to W. the future payments as a collateral security. X. then became bankrupt and the trustee claimed all the payments which had become due since the bankruptcy. *Held*, that these payments were not debts under sect. 44 (2) (iii.) of the Bankruptcy Act, 1883, and that the mortgage of them was not an assignment as against the trustee in bankruptcy.—*Wilmot v. Alton*, L.R. [1896] 2 Q.B. 254; 74 L.T. 818.

### **Bastardy:—**

- (ii.) **Q. B. D.**—*Putative Father out of Jurisdiction—Service of Summons.*—Service of a summons at the house which the putative father had shortly before quitted for America was held sufficient service.—*Reg. v. Webb and Others (Justices) and Grove*, L.R. [1896] 1 Q.B. 487; 74 L.T. 428.

### **Bye-Law:—**

- (iii.) **Q. B. D.**—*Borough—Submission of Plans to Corporation—Appeal to Quarter Sessions—Reasonableness of Bye-Law.*—By the bye-laws of a borough, plans of new buildings were to be submitted to the corporation, who were to signify their approval or disapproval within 21 days, and a builder proceeding without their approval was liable to a penalty. By a local Act there was an appeal to quarter sessions from a refusal to approve. *Held*, that the bye-law was not unreasonable and was valid.—*Cook v. Hainsworth*, L.R. [1896] 2 Q.B. 85; 75 L.T. 51.

### **ChamPERTY:—**

- (iv.) **Ch. D.**—*Unconscionable Bargain—Acquiescence—Rescission.*—A contract to supply information concerning, and to actively assist in the recovery of, property on condition of sharing in what may be recovered is void as being in the nature of champerty although no hostile action may be necessary. A right to rescind a contract is not lost by delay through ignorance of the right if the position of the parties is unchanged.—*Rees v. De Bernardy*, L.R. [1896] 2 Ch. 437; 74 L.T. 585.

### **Charity:—**

- (v.) **C. D.**—*Charitable Bequest—Validity.*—Property was left in trust to pay the income to "respectable single women." *Held*, that the intention was for the relief of distress and that the gift was good. *Attorney-General v. Comber* (2 St. & St. 93) and *Thompson v. Corley* (27 Beav. 629) followed.—*In re Dudgeon*; *Truman v. Pope*, 74 L.T. 613.
- (vi.) **Ch. D.**—*Endowed Schools Act, 1869, s. 14—Christ's Hospital—Endowments.*—An application to the Court to make over to the new governing body of Christ's Hospital under a scheme approved by virtue of the Endowed Schools Act, 1869, certain endowments less than 50 years in existence which were excluded from that scheme and left in the hands of the old governing body, was refused in the face of opposition on the part of the old governing body whose title was founded on Royal Charter and Act of Parliament.—*Attorney-General v. Governors of Christ's Hospital*, L.R. [1896] 1 Ch. 879.
- (vii.) **C. A.**—*Will—Construction.*—Decision of the Court below (*see Vol. 21*, p. 73, v.) affirmed.—*In re MacDuff*; *MacDuff and MacDuff*, L.R. [1896] 2 Ch. 451; 74 L.T. 706.

**Colonial Law :—**

- (i.) **P. C.**—*Canada—British North America Act, 1867—Canada Temperance Act, 1886 (Revised Statutes of Canada, 49 Vict., c. 106)—Ontario Act (53 Vict., c. 56), s. 18—Prohibitive Liquor Laws—Powers of Dominion Parliament.*—The Dominion Parliament can in the interest of the whole country legislate on local and provincial interests. Provincial legislatures have no power to repeal Statutes, which would be beyond their power to enact. The Prohibitive Enactments of the Canada Temperance Act are not "for the regulation of trade and commerce;" and the British North America Act, 1867, gives no authority to local legislatures to abolish liquor traffic.—*Attorney-General of Ontario v. Attorney-General of Canada and Others*, L.R. [1896] A.C. 348; 74 L.T. 533.
- (ii.) **P. C.**—*New South Wales—Parliamentary Representatives Allowance Acts (53 Vict., 1889, No. 12).*—Sect. 2 of the Act applies to the Legislative Assembly as a permanent part of the constitution of the Colony, and is not restricted to the Parliament which was sitting at the time the Act was passed.—*Attorney-General of New South Wales v. Rennie*, L.R. [1896] A.C. 376; 74 L.T. 532.
- (iii.) **H. L.**—*Lagos—Practice—Appeal—Action in formá pauperis—Security*—S. C. of Lagos Ordinance No. 4 of 1876, O. liii.—To refuse to a litigant who had been admitted to sue in *formá pauperis* leave to appeal unless he gave security for payment of the sum awarded by the judgment which he desired to impeach, was held to be an improper exercise of the discretion committed to the full Court.—*Johnson v. Voight & Co.*, 75 L.T. 57.
- (iv.) **P. C.**—*Natal—Grant of Land with Reservation—Right to take Water.*—Land in Natal was granted on the condition that it should be liable to have water courses made over it for the public use. Held, that this reservation included a right to divert and use water from a natural stream.—*Remfry v. Surveyor-General of Natal*, 75 L.T. 58.
- (v.) **P. C.**—*Victoria—Wreck in Port—Cost of Removal—Marine Act, 1890 (Consolidated Victorian Statutes, No. 1565), s. 18.*—The Act imposes upon the owner the cost of removing a wreck from ports in Victoria; and he is liable for excess of expenses beyond the proceeds of sale of the wreck, but the costs of lighting the wreck prior to removal are not part of such expenses.—*Smith and Sons v. Wilson*, 75 L.T. 81.
- (vi.) **P. C.**—*New South Wales—Practice—Consultations—Expenses of Witnesses—Taxation.*—A taxing officer in estimating fees may consider the number of consultations, but he need not inquire into their length. The allowance to witnesses should be made on a consideration of the claims of each individual.—*Commission for Railways v. O'Rourke*, 75 L.T. 84.

**Company :—**

- (vii.) **Ch. D.**—*Winding-up—Re-Construction—Option of Allotment—Failure to Allot—Liability of Liquidator—Companies Acts, 1862—Winding-up Act, 1890, and rr. 89 and 90.*—A shareholder of a company in liquidation had on making a certain payment a right to allotment of shares in a revival of the company under a re-construction scheme. He made the payment, but the bankers who had received it omitted his name from the list of applicants which they supplied to the liquidator, who in consequence sold the shares. Held, that the Court could not declare the liquidator liable in damages.—*In re Hill's Waterfall Estate and Gold Mining Company*, L.R. [1896] 1 Ch. 947; 74 L.T. 341.



- (i.) **C. D.**—*Reduction of Capital—Powers of Memorandum and Articles—Opposition by Shareholder—Companies Acts, 1867, ss. 11, 15; and 1877.*—A company had in its memorandum of association a clause that shares might be "divided into different classes with such preference priorities, restrictions, or special incidents, as may from time to time be provided by the articles and special resolution of the company"; and there was a power in the articles to attach or take away priorities from any shares by special resolution. An article was subsequently added giving power to reduce capital, and a resolution was passed and confirmed to cancel a certain number of deferred shares and to convert the remainder of the deferred shares into ordinary shares. On the petition being presented it was opposed by a holder of ordinary shares who was also a creditor. *Held*, that having regard to the clauses in the memorandum and articles, the resolution was not *ultra vires*; that the objecting shareholder had full notice of the proposal; that his position as a creditor was not affected; and that the resolution was not inequitable.—*In re The Hyderabad (Deccan) Co., Limited*, 75 L.T. 23.
- (ii.) **C. A.**—*Winding-up—Distress for Interest by Mortgagees—Companies Act, 1862, ss. 87, 163.*—Where on the winding-up of a Cotton Mill Co. the liquidator had continued the business in order to sell the undertaking as a going concern, leave was refused to mortgagees to distrain for interest accrued due during the liquidator's possession as his efforts were as much in their interest as in that of the creditors.—*In re Higginshaw Mills and Spinning Co., Limited; the Manchester and County Bank v. the Higginshaw, &c., Co.*, L.R. [1896] 2 Ch. 544; 75 L.T. 5.
- (iii.) **H. L.**—*Interest out of Capital on Prepaid Calls.*—Decision of C. A. (see Vol. 21, p. 58, ii.) affirmed.—*Lock v. Queensland Investment and Land Mortgage Co., Limited*, 75 L.T. 3.
- (iv.) **H. L.**—*Fraudulent Prospectus—Repudiation of Contract to Take Shares—Calls.*—Where a defendant pleads in an action for calls on shares that he was induced to take the shares by fraud, it lies on the plaintiff to shew that the defendant adhered to the contract after he discovered the fraud. A document which is intentionally made to convey a false impression upon which persons are induced to act is false and fraudulent although no specific statement in it is proved to be false.—*Aaron's Reefs, Limited v. Twiss*, L.R. [1896] A.C. 273; 74 L.T. 794.
- (v.) **C. A.**—*Option to Call for Shares—Breach of Contract—Measure of Damages.*—A company agreed to give to a person an option or call on some of its shares up to a fixed date, but before that date entered into a contract to sell its assets to another company. *Held*, that in estimating the damages, if any, of the option holder the price paid by the purchaser should alone be taken into account.—*In re The South African Trust and Finance Co., Limited; e.p. Hirsch & Co.*, 74 L.T. 769.
- (vi.) **C. D.**—*Borrowing Powers—Articles of Association—Uncalled Capital.*—Where articles of association, but not the memorandum, authorised a company to borrow on its property and effects, it was *held* that it could mortgage its uncalled capital.—*Jackson v. Rainford Coal Co.*, L.R. [1896] 2 Ch. 340.
- (vii.) **H. L.**—*Judgment of C. A. (see Vol. 20, p. 37, ii.) affirmed; but each party to pay own costs.*—*Craig v. Midland Coal and Iron Co.*, 74 L.T. 744.
- (viii.) **C. A.**—*Prospectus—Omission of Facts—Rescission of Contract?*—Decision of C. C. (see Vol. 21, p. 74, vi.) affirmed.—*McKeown v. Boudard Peveril Gear Co., Limited*, 84 L.T. 712.

- (i.) **C. A.**—*Winding-up—Shares Allotted as fully paid—Liability of Holder—Companies Act, 1867, s. 25.*—The holder of shares purporting to be fully paid, of which he was the original allottee, is liable to be placed on to the list of contributories in a winding-up, if he had knowledge of facts which should have led him to the conclusion that the shares were not paid up as described. *The Building Estates Brickfield Co., Limited; Parbury's Case* (see Vol. 21, p. 37, ii.) followed.—*In re Veuve Monnier et ses fils, Limited; e. p. Bloomenthal, L.R.* [1896] 2 Ch. 525; 74 L.T. 670.
- (ii.) **C. A.**—*Winding-up—Offer to Underwrite—Acceptance after close of Public Subscription.*—Decision of Court below (see Vol. 21, p. 75, v.) reversed.—*In re The Hemp Yarn and Cordage Co., Limited; Hindley's Case, L.R.* [1896] 2 Ch. 121; 74 L.T. 627.
- (iii.) **C. A.**—*Companies (Winding-up) Act, 1890—Misfeasance—Directors—Auditors.*—(See Vol. 21, p. 57, ii.). Affirmed as to misfeasance. An auditor is not an insurer, and where there is nothing to excite suspicion, less care may be reasonable than would be so considered if suspicion ought to have been aroused.—*In re The Kingston Cotton Mill Co., Limited; e. p. Pickering and Peasegood, No. 2, L.R.* [1896] 2 Ch. 278; 74 L.T. 568.
- (iv.) **C. D.**—*General Meeting—Evidence of Resolution—Extraordinary Meeting—Sufficiency of Notice—Companies Act, 1862, s. 51.*—Though by sect. 51 the declaration of the chairman of a general meeting of a limited company is "conclusive evidence" that a resolution has been carried, the Court may enquire whether the provisions of the Act has been complied with. A statement in a notice convening an extraordinary general meeting that a resolution rescinding Table A which was to be submitted could be seen at the offices of the company's solicitors was held sufficient.—*Young v. South African and Australian Exploration and Development Syndicate, Limited, L.R.* [1896] 2 Ch. 268; 74 L.T. 527.
- (v.) **C. D.**—*Winding-up—Debentures—Covering Deed Poor and General Rate—Distress.*—Goods of a company in hands of a receiver for the trustee of a covering deed securing debentures are not distrainable for poor or general rates.—*Richards v. Overseers of the Poor of the Parish of Kidderminster, L.R.* [1896] 2 Ch. 212; 74 L.T. 483.
- (vi.) **C. A.**—*Preference Shares—Cumulative or Non-Cumulative Dividends.*—The memorandum of association of a company provided that "holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of 10 per cent. per annum." Held, that these dividends were not cumulative.—*Staples v. The Eastman Photographic Materials Co., L.R.* [1896] 2 Ch. 303; 74 L.T. 479.
- (vii.) **C. A.**—*Floating Security—Debentures—Date of Assignment—Set-off—Receiver—Goods Paid For but not Delivered—Managing Director.*—Debentures issued as floating security over assets of a company operate as an assignment of debts due to the company on the appointment of a receiver, but until assignment there is a right of set-off. A purchaser of goods paid for and delivered only in part, and not earmarked, has a claim for liquidated damages for money had and received on a consideration which has totally failed. Persons dealing with a managing director who acts within his apparent authority have a right to assume that he is properly appointed.—*Biggerstaff v. Rowatt's Wharf, Limited; Howard v. Rowatt's Wharf, Limited, L.R.* [1896] 2 Ch. 93; 74 L.T. 478.
- (viii.) **C. A.**—*Powers of Board to deal with Business without Notice.*—A board of directors can deal at any meeting with all business of the company, whether it has been announced or not in a notice summoning the meeting.—*La Compagnie de Mayville v. Whitley, L.R.* [1896] 1 Ch. 788; 74 L.T. 441.

- (i.) **C. A.**—*Winding-up—Scheme of Arrangement—Meaning of “Discount” for Prepayment of Calls.*—The word “discount” in an essentially commercial document means “rebate of interest;” not “present value.”—*In re the Land Securities Company, Limited; e. p. Farquhar*, L.R. [1896] 2 Ch. 320; 74 L.T. 400.
- (ii.) **C. D. & C. A.**—*Underwriting Contract to Subscribe for Shares—Withdrawal—Irrevocability—Companies Act, 1862, s. 35.*—An underwriting contract to subscribe for shares in a company was entered into with the promoter by a person who, before allotment, repudiated the agreement. *Held*, that the contract was an authority coupled with an interest and irrevocable.—*In re Hannans Empress Gold Mining and Development Co., Limited*, 74 L.T. 550; 75 L.T. 45.

### Contract:—

- (iii.) **P. C.**—*Indemnity—Estoppel—Abandonment of Claim.*—A guarantor, who had agreed to indemnify a joint guarantor for a loss suffered, sought to have the agreement of indemnity discharged. *Held*, that in absence of a contract to discharge it, it could be enforced notwithstanding an express representation of an intention to abandon it.—*Chadwick v. Manning*, L.R. [1896] A.C. 231.
- (iv.) **H. L.**—*Implied Condition of Fitness—Sale of Goods Act, 1893, s. 14—Evidence.*—Evidence of negotiation prior to contract is admissible to raise the implication of condition specified in sect. 14 of the Sale of Goods Act, 1893.—*Gillespie Brothers and Co. v. Cheney Eggar and Co.*, L.R. [1896] 2 Q.B. 59.
- (v.) **C. D.**—*Option Limited in Time—Exercised by Unauthorised Agent—Ratified after Limited Period—Invalid.*—A partnership deed provided for the purchase of the business by the surviving partner on notice within a given time after the decease of the other. Such notice was given on behalf of the surviving partner (a person of unsound mind) by his solicitor without authority. After the given time had expired, a further notice was given under the Lunacy Act. *Held*, that both notices were invalid.—*Dibbins v. Dibbins*, L.R. [1896] 2 Ch. 348; 75 L.T. 137.

### Copyhold:—

- (vi.) **Q. B. D.**—*Heriots.*—The lord's right to a heriot may exist in copyhold as well as in freehold tenements of a manor.—*Western v. Bailey*, L.R. [1896] 2 Q.B. 234.

### Corporation of London:—

- (vii.) **H. L.**—*Revenue—Metage on Grain Act, 1872, s. 4.*—(See Vol. 21, p. 38, i.) Affirmed.—*Cotton v. Vogan & Co.*, 74 L.T. 598.

### Costs:—

- (viii.) **C. A.**—*Administration for purpose of Making Title—Lands Clauses Act, 1845, s. 80.*—Where a railway company took leasehold lands settled on a life tenant under a will with remainder to several legatees who predeceased the life tenant, it was *held* that the company was liable under sect. 80 of the Act for the costs of administration to the legatees in remainder, but not to costs of administration to the original testator. (*In re Midland Great Western (Ireland) Railway; e. p. Rorke* [1894], Ir. Ch. 146; and *City of Dublin Junction Railways; e. p. Kelly*, 31 L. Rep. Ir. 187, followed.)—*In re Lloyd and North London Railway (City Branch)*, L.R. [1896] 2 Ch. 397; 74 L.T. 548.

**Counsel:—**

- (i.) **Q. B. D.**—*County Court Costs—Counsel's Fees—Special Allowance.*—The special item, No. 86, can only be allowed once in the same case, though counsel may have been in Court more than once.—*Atkinson v. Carlisle (Mayor of)*, L.R. [1896] 1 Q.B. 393.

**County Court:—**

- (ii.) **Q. B. D.**—*Action in County Court by Trustees of Charity—Rent Charge—Question of Title—Charitable Trusts Act, 1853, s. 41—County Courts Act, 1888, s. 60.*—An action to recover £10 arrears of rent charge brought by trustees of a charity after leave obtained under sect. 17 of the Charitable Trusts Act was held to be within the jurisdiction of a county court as not being a "proceeding" within sect. 41 of that Act; as not raising a question of title to land under sect. 60 of the County Court Act; and as the value of the hereditament did not exceed £50 a year.—*Bassano and Others v. Bradley and Others*, L.R. [1896] 1 Q.B. 645; 74 L.T. 553.
- (iii.) **Q. B. D.**—*High Bailiff—Failure to Levy—Remedy—County Courts Act, 1888, s. 49.*—The remedy given by sect. 49 of the County Courts Act against a high bailiff who has negligently failed to levy execution, is not in substitution but in addition to the common law action.—*Watson v. White*, L.R. [1896] 2 Q.B. 9; 74 L.T. 702.
- (iv.) **C. A.**—*Practice—Joinder of Plaintiffs—Separate Causes of Action—County Court Rules, 1882, O. iii., r. 1; O. xlv., rr. 18, 19—Employers Liability Act, 1880, s. 6, sub-s. 3.*—Though out of one act of a defendant several plaintiffs may have cause of action, they cannot be joined under O. iii., r. 1, in a county court action. And O. xlv. of the county court rules and sect. 6 of the Employers Liability Act, 1880, make no exception to this rule.—*Carter and Others v. Rigby & Co.*, L.R. [1896] 2 Q.B. 113; 74 L.T. 744.
- (v.) **Q. B. D.**—*Administration of Insolvent Estate—Costs—Discretion of Registrar—County Court Rules, O. 50 A., r. 20.*—In taxation the administrator of an insolvent estate is allowed only such costs as are necessary in the discretion of the registrar for the protection of the estate.—*Pain v. Bowden*, L.R. [1896] 2 Q.B. 301; 75 L.T. 102.
- (vi.) **Q. B.**—*Claim under a Counter Claim over £20—Appeal without Leave—County Court Act, 1888, s. 120.*—The right of appeal under sect. 120 of the County Court Act, 1888, applies when the counter claim exceeds £20 although the plaintiff's claim is below that amount.—*Smith v. Gill*, L.R. [1896] 2 Q.B. 166.

**Constitutional Law:—**

- (vii.) **At Bar.**—*Foreign Enlistment Act, 1870—Construction—British Subject out of Jurisdiction—Indictment—Allegations.*—When a statute is applicable to the Queen's Dominions it applies to all the Queen's subjects. Therefore, a British subject may commit a crime within the jurisdiction while he is beyond the Queen's dominions. Such a statute also applies to foreigners during a residence within the dominions. In an indictment for an offence against the Foreign Enlistment Act, 1870, it is sufficient to allege that the Act was in operation where the alleged offence was committed; and the conclusion of the indictment that the offence is against the form of the statute and against the peace of the Queen is sufficient without stating that the defendants are subjects of the Queen.—*Reg. v. Jameson and Others*, 75 L.T. 77.

**Covenants :—**

- (i.) **C. A.**—*Restrictive Covenants—Variation—Private Treaty.*—(See Vol. 21, p. 75, vii.) *Affirmed.*—*Knight v. Simmonds*, L.R. [1896] 2 Ch. 294; 74 L.T. 563.

**Criminal Law :—**

- (ii.) **Q. B. D.**—*Contempt of Court—Impending Trial—Newspaper Comments.*—An applicant for a writ of attachment for contempt of court against the writer and publisher of articles in a newspaper commenting on criminal charges under investigation, must shew that something has been published which either is intended, or is calculated, to prejudice a trial which is pending.—*Reg. v. Payne & Cooper*, L.R. [1896] 1 Q.B. 577; 74 L.T. 351.
- (iii.) **Q. B. D.**—*Intent to Defeat Creditors—Debtors Act, 1869, s. 13, sub-s. 2.*—A defendant in an action for unliquidated damages who, before judgment, gives a bill of sale to defeat the plaintiff, cannot be convicted under the Debtors Act, as the plaintiff is not a creditor of the defendant until recovery of judgment.—*Reg. v. Hopkins & Ferguson*, L.R. [1896] 1 Q.B. 652.
- (iv.) **Q. B. D.**—*Practice—Indecent Assault—Evidence of Complaint made by Prosecutrix in absence of Prisoner.*—In a trial of an indictment for assault on a female, if the prosecutrix has made a complaint immediately after the occurrence, the whole statement containing her alleged complaint should be submitted to the jury.—*Reg. v. Lillyman*, L.R. [1896] 2 Q.B. 167; 74 L.T. 730.
- (v.) **Q. B. D.**—*Evidence—Statements made by a Bankrupt on Bankruptcy Examination—Bankruptcy Acts, 1883 and 1890.*—A bankrupt's statements in his examination are not induced by undue influence and are, therefore, admissible in evidence against him unless excluded by sect. 27 (2) of the Act of 1890, and oral evidence of them is not excluded by sect. 17 (8) of the Act of 1883.—*Reg. v. Erdheim*, L.R. [1896] 2 Q.B. 260; 74 L.T. 784.
- (vi.) **C. C. R.**—*Offence not Originally Indictable—Claim to be Tried by Jury—Indictment—Necessary Averment—Summary Jurisdiction Act, 1879, s. 17.*—Where a person charged with an offence which is punishable summarily claims to be tried by jury in accordance with the provisions of the Summary Jurisdiction Act, the fact that the indictment is preferred in consequence of his claim is not a necessary averment.—*Reg. v. Chambers*, 75 L.T. 76.

**Crown :—**

- (vii.) **H. L.**—*Salmon Fishings—Crown Claims.*—Where the Crown appears to have rights to salmon fishings, the Court will stay an action in which they are in dispute pending a decision of the Crown authorities to intervene.—*Ogston v. Stewart*, L.R. [1896] A.C. 120.

**Design :—**

- (viii.) **C. A.**—*Copyright—New or Original Design—Patents, Designs and Trade Marks Act, 1883, ss. 47, 50, 60, 90, and 1888.*—A combination of old shapes may result in a new or original design for shape; but an old shape, or an old shape with the omission or addition of unimportant detail, applied to a new use will not be protected by the Acts if registered.—*In re Clarke's Registered Design; Clarke v. Sax and Co., Limited*, L.R. [1896] 2 Ch. 38; 74 L.T. 631.

**Detinue:—**

- (i.) **C. A.**—*Chattels Found on Private Property—Right to Possession.*—The presumption is that a chattel found upon private land is in the possession of the owner of the land and he is entitled against the finder.—*The South Staffordshire Waterworks Company v. Sharman*, L.R. [1896] 2 Q.B. 44; 74 L.T. 761.

**Divorce:—**

- (ii.) **P. D.**—*Practice—Co-respondent—Matrimonial Causes Act, 1857, ss. 28, 33.*—Where a petitioner seeks relief on the ground of adultery committed with a man alive and known, he must make this person a co-respondent.—*Jones v. Jones*, L.R. [1896] P. 165; 75 L.T. 190.
- (iii.) **P. D.**—*Restitution of Conjugal Rights—Matrimonial Causes Act, 1884, s. 5.*—A wife, whose husband refused to receive her because she had left her home through disagreement with his children by a former marriage, was held entitled to a decree for restitution of conjugal rights.—*Oldroyd v. Oldroyd*, L.R. [1896] P. 175.
- (iv.) **P. D.**—*Practice—Sequestration—Money held by Persons not Party to Action—Matrimonial Causes Act, 1857, s. 52.*—Sequestrators cannot attach money alleged, but denied, to be held for the judgment debtor by persons who are not parties unless these submit to the jurisdiction of the Court.—*Craig v. Craig and Hamp*, L.R. [1896] P. 171.
- (v.) **H. L.**—*Evidence of Deceased Witness—Judge's Notes.*—A certified copy of the Judge's notes of evidence of a witness who dies is not accepted as proof of that evidence on the second reading of a bill for divorce.—*Griffin's Divorce Bill*, L.R. [1896] A.C. 133.
- (vi.) **P. D.**—*Practice—Substituted Service—Affidavit.*—An affidavit of petitioner should be produced on an application for substituted service on a co-respondent.—*Williams v. Williams and Pocock*, L.R. [1896] P. 153.
- (vii.) **P. D.**—*Evidence—Decree in Previous Suit.*—Where a wife petitioned for dissolution of marriage on ground of adultery and desertion, and produced the decree in a suit in which her husband had been co-respondent, which stated that the respondent had been guilty of adultery with him, and that he had been condemned in costs, but did not state any finding of the jury that he had been guilty of adultery with the respondent, it was held that the decree was not sufficient evidence against him.—*Ruck v. Ruck*, L.R. [1896] P. 152.
- (viii.) **P. D.**—*Variation of Settlements—Costs out of Corpus.*—Where a petitioner had obtained a decree absolute for the dissolution of her marriage, the Court extinguished a life interest of the respondent in property which she had brought into settlement, and directed the trustees to raise and pay to her a certain sum out of the corpus to cover costs.—*Douglas v. Douglas*, 74 L.T. 884.

**Donatio Mortis Causa:—**

- (ix.) **Q. B. D.**—*Antecedent Delivery.*—Where in contemplation of death a person who died a few days afterwards gave an article absolutely to the custodian of it, it was held that the change so made in the character of possession was sufficient to constitute a *donatio mortis causa*.—*Cain v. Moon*, L.R. [1896] 2 Q.B. 283; 74 L.T. 728.

**Dower:—**

- (x.) **Ch. D.**—*Widow's Charge under Intestates Estates Act, 1890, ss. 2, 4—Abatement and Dower.*—A widow's dower out of realty of an intestate abates in respect of her charge of £500 under the Intestates Estates Act, 1890.—*In re Charriere*; *Duret v. Charriere*, L.R. [1896] 1 Ch. 912; 74 L.T. 650.

**Ecclesiastical Law :—**

- (i.) **P. D.**—*Sequestration—Bankruptcy of Incumbent—Discharge—Relaxation—Sequestration Act, 1871, ss. 1 to 4.*—Although a bankrupt clergyman may have obtained his discharge, the ordinary cannot relax sequestration of the benefice if the bankrupt's debts remain unpaid.—*In re Lawrence, L.R. [1896] P. 244.*

**Escheat :—**

- (ii.) **C. D.**—*Intestates Estates Act, 1884, ss. 4, 7.*—A testatrix devised a fee simple to her executors with directions that it should be sold and that the purchase money should form part of her general personal estate upon which she charged certain legacies, but she made no disposition of the residue. No heir at law having come in, it was held, that sect. 4 of the Intestates Estates Act, 1884, applied, and the Crown was entitled by escheat.—*In re Wood; Attorney-General v. Anderson, L.R. [1896] 2 Ch. 596; 75 L.T. 28.*

**Estate Duty :—**

- (iii.) **Ch. D.**—*Estate Duty on Leaseholds Specifically Bequeathed—Finance Act, 1894, s. 9 (1).*—On leaseholds specifically bequeathed estate duty is payable out of general personal estate of testator.—*In re Culverhouse; Cook v. Culverhouse, 74 L.T. 347; L.R. [1896] 2 Ch. 251.*

**Estate Pur Autre Vie :—**

- (iv.) **H. L.**—*Wills Act, 1837, s. 6—Special Occupant.*—An appellant conveyed a life estate to the use of himself and the respondent or their heirs upon trusts with a declaration of trust by the respondent in favour of an infant of all the estate conveyed to her. The infant died in the lifetime of both the parties. Held, that as there was no "special occupant" named in the deed, the infant's estate passed to his personal representative and not to his heir.—*Earl of Mount Cashel v. More-Smith, L.R. [1896] A.C. 158; 74 L.T. 321.*

**Executor :—**

- (v.) **Ch. D.**—*Retainer—Debt of Bankrupt Legatee.*—Where executors made a payment to mortgagees on account of a suretyship of the testator for a mortgagor who became bankrupt, they were entitled to retain from a bequest of residue by the testator to the bankrupt, the amount of the payment with interest at 4 per cent.—*In re Watson; Turner v. Watson, L.R. [1896] 1 Ch. 925; 74 L.T. 453.*

**Fancy Bread :—**

- (vi.) **Q. B. D.**—*Shape—3 Geo. IV., c. 106, s. 4—Bread Act, 1836, s. 4.*—A loaf which is the same in shape, size, and appearance as the ordinary half quarten is not fancy bread and must be sold by weight.—*The V. V. Bread Co. v. Stubbs, 74 L.T. 704.*

**Fixtures :—**

- (vii.) **C. D.**—*Executor and Heir—Tapestry.*—Under a devise of the mansion house, tapestry nailed to battens let into the plaster and nailed to brickwork pass as fixtures.—*Norton v. Dashwood, L.R. [1896] 2 Ch. 497.*

**Franchise :—**

- (viii.) **C. A.**—*Parliament—Claims made after Close of List—Parliamentary Registration Act, 1843, s. 41—County Voters Registration Act, 1865, s. 15.*—Persons who, after a date at which a revising barrister has announced that the lists of parliamentary and municipal electors will be closed, for the first time advance a claim to be included in the lists, have no right to be heard. *Rep. v. Soden, L.R. [1896] 1 Q.B. 634; 74 L.T. 520.*

**Friendly Society:—**

- (i.) **C. A.**—*Infant Members—Instrument of Dissolution signed by Fathers and Guardians—Friendly Societies Act, 1855, ss. 9, 13, 15, 21, 25, 27; 1875, ss. 6, 9, 18, 15, 21, 25.*—A society, formed under the Act of 1855, composed of members under 18 years of age, and under the government of a committee of another lodge, was precluded from dissolving itself under sect. 13 of the Act, or sect. 25 of the Act of 1875, without the concurrence of that committee.—*Rudd v. Jones, L.R. [1896] 2 Ch. 554; 74 L.T. 714*

**Gas Company:—**

- (ii.) **C. A.**—*Arrears due—Managers appointed by Court—New Occupation—Gas Works Clauses Act, 1871, ss. 11, 39.*—Decision of Court below (*see Vol. 21, p. 77, iv.*) reversed. *In re Smith; e p. Mason, followed.*—*Paterson v. The Gas Light and Coke Co., L.R. [1896] 2 Ch. 476; 74 L.T. 640.*

**Gas Works:—**

- (iii.) **Q. B. D.**—*Breach of Statutory Duty—Remedy—Gas Works Clauses Act, 1871, ss. 11, 12, 36.*—The remedy of a consumer who suffers damage from insufficient supply by a gas company which is subject to the Gas Works Clauses Act, 1871, is to proceed by penalties under sect. 36 of the Act, and not by action.—*Clegg, Parkinson & Co. v. Earby Gas Co., L.R. [1896] 1 Q.B. 592.*

**Guarantee:—**

- (iv.) **H. L.**—*Representations as to Credit—Writing—Fraud—Mercantile Law Amendment (Scotland) Act, 1856, s. 6—Lord Tenterden's Act.*—Sect. 6 of the Mercantile Law Amendment (Scotland) Act requires in terms similar to the same section of Lord Tenterden's Act that representations as to the dealings of a person made for the purpose of enabling him to obtain credit shall be in writing; and the fact that these representations are made fraudulently to enable the person making them to obtain a benefit does not take them out of the Act.—*Clydesdale Bank, Limited v. Paton and Another, 74 L.T. 738.*

**Highway:—**

- (v.) **H. L.**—*Footpaths at Sides of Main Roads in Urban Sanitary Districts—Repair—Highways and Locomotives (Amendment) Act, 1878, s. 13—Local Government Act, 1888, s. 11.*—County councils are liable under sect. 11 of Local Government Act for repair of footpaths at the sides of disturnpiked roads which fall within sect. 13 of Highways and Locomotives Act, 1878.—*County Council of Derby v. Urban District Council of Matlock Baths and Scarthin Nick, L.R. [1896] A.C. 315; 74 L.T. 595.*

**Husband and Wife:—**

- (vi.) **P. D.**—*Desertion—Time for Proceedings—Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 11.*—The desertion of a married woman by her husband is a continuing act and an application for an order can be made later than six months after the commencement of the desertion.—*Heard v. Heard, L.R. [1896] P. 188.*
- (vii.) **P. D.**—*Persistent Cruelty—Summary Jurisdiction (Married Women) Act, 1895, s. 4—Retrospective Operation of Section.*—Sect. 4 is retrospective and will regard acts of persistent cruelty committed earlier than 1st January, 1896.—*Lane v. Lane, 74 L.T. 557.*



- (i.) **P. D.**—*Summary Jurisdiction (Married Women) Act, 1895, s. 5, sub-s. (c)*—*Provision for Wife—Her Costs*.—Courts of summary jurisdiction must consider the means and the earning capabilities of the husband and of the wife before making an order. Where a wife has to defend on appeal an order which she has obtained, her costs will be allowed. —*Earnshaw v. Earnshaw*, L.R. [1896] P. 160; 74 L.T. 560.
- (ii.) **C. A.**—*Divorce—Maintenance—Alienation or Release—Divorce and Matrimonial Causes Acts, 1857 (s. 32) and 1866, s. 1.*—An allowance to a divorced wife under sect. 1 of the Divorce and Matrimonial Causes Act, 1886, is for her maintenance and cannot be assigned or released without the sanction of the Court. Payment will not be enforced of arrears left unclaimed for a long time.—*Watkins v. Watkins*, L.R. [1896] P. 222; 74 L.T. 636.
- (iii.) **C. D.**—*Post-Nuptial Settlement with Covenant as to After-Acquired Property—Operation of Fines and Recoveries Act and of Malins's Act—Divorce—Resettlement by Divorce Court under Mistake—20 & 21 Vict., c. 85, s. 45; and 22 & 23 Vict., c. 61, s. 5.*—A married woman in 1877 made a post-nuptial settlement in which her husband joined of personal property to which she was entitled under intestacies and under instruments of earlier date than Malins's Act. There was a covenant to settle after-acquired property and the instrument was acknowledged under the Fines and Recoveries Act. By the will of a person who died in 1890, she acquired real property. In May, 1893, she was divorced. Under the impression that the instrument was valid, the Divorce Court varied it by consent of parties. In a subsequent action by the settlor, *Held*, that the settlement was void as to property not reduced into possession at the date of the decree nisi, as she was not at the date of the instrument entitled to real property within the Fines and Recoveries Act nor to personal property within Malins's Act; that consequently the resettlement by the Divorce Court did not bind this property. That the Court having power to put her upon terms required an undertaking from her that any further applications should be dealt with as if they had been made prior to the resettlement.—*Allcard v. Walker; in re Lucas Walker v. Lupton*, L.R. [1896] 2 Ch. 369; 74 L.T. 487.
- (iv.) **P. D.**—*Persistent Cruelty—Wilful Neglect to Provide Maintenance—Time for Proceeding—Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 8; Summary Jurisdiction Act, 1848, s. 11.*—Persistent cruelty by a husband towards, and neglect to provide maintenance for, his wife are not continuing offences. Complaint must be made within six calendar months of the offence.—*Ellis v. Ellis*, L.R. [1896] P. 251.

### Industrial and Provident Society:—

- (v.) **Q. B. D.**—*Intestate Member—Distribution of his Property—Industrial and Provident Societies Acts (1876, s. 11, and 1893, s. 27).*—The power given by sect. 27 of the Industrial and Provident Societies Act, 1893, to the committee of a society to distribute the property therein of an intestate member who has made no nomination of such property is completely discretionary.—*Escrutt v. Todmorden Co-operative Society*, L.R. [1896] 1 Q.B. 461; 74 L.T. 850.

### Improvements:—

- (vi.) **Ch. D.**—*Tenants in Common—Mortgage—Sale—Allowance for Improvements.*—When tenants in common in fee had effected improvements, one half of the present value of the improvements was allowed to them and the other half to the life tenant in distributing proceeds of sale by a mortgagee.—*In re Cook's Mortgage; Lawledge v. Tyndall*, L.R. [1896] 1 Ch. 923.

**Insurance:—**

- (i.) **C. A.**—*Accident—Nervous Shock from Fright.*—A railway signalman, in the excitement of his efforts in the course of his duty to prevent an accident to a train, suffered a nervous shock which incapacitated him. He was insured by the railway company under a policy which declared that the insurance was absolute for all accidents occurring in the discharge of his duty. *Held*, that he had sustained an accident within the terms of the policy.—*Pugh v. London, Brighton and South Coast Railway*, L.R. [1896] 2 Q.B. 248; 74 L.T. 724.
- (ii.) **C. D.**—*Accident—Renewed Policy is New Contract.*—A renewal of a policy of insurance for the term of a year against accident is a new contract, not a renewal of the original contract.—*Stokell v. Heywood*, 74 L.T. 781.

**Landlord and Tenant:—**

- (iii.) **C. A.**—*Lease—Covenant not to Assign without Licence—Licence Withheld.*—The plaintiff held the reversion of a lease which contained a covenant not to assign without a licence, which was "not to be unreasonably withheld," and a proviso for re-entry on breach. He refused his licence, because he wished to acquire possession himself, although he had made no binding offer to purchase. *Held*, that the licence had been unreasonably withheld.—*Bates v. Donaldson*, L.R. [1896] 2 Q.B. 241; 74 L.T. 751.
- (iv.) **C. A.**—*Farm Lease—Covenant to Consume Hay and Straw on Premises—Penalty.*—A covenant in a farm lease fixed a penalty of £3 per ton for all hay and straw sold off the premises during the last year of the tenancy. There was a difference in the manurial value of hay and of straw. *Held*, that the sum made payable was a penalty, and not liquidated damages.—*Willson and Another v. Love and Others*, L.R. [1896] 1 Q.B. 626; 74 L.T. 580.
- (v.) **Q. B. D.**—*Allotment?—Allotment and Cottage Gardens Compensation for Crops Act, 1887, s. 4.*—A small piece of land cultivated by a seedsman for trade purposes is not an allotment within sect. 4.—*Cooper v. Pearse*, L.R. [1896] 1 Q.B. 562; 74 L.T. 495.

**Lease:—**

- (vi.) **C. D.**—*Possession Prior to Parol Agreement—Continuance—Part Performance—Statute of Frauds, ss. 1 and 4.*—The plaintiff went into possession of premises on a parol agreement for a lease for more than three years, which was subsequently varied as to rent. *Held*, that continuance of possession was a parol performance which took the case out of the Statute of Frauds and entitled the plaintiff to specific performance.—*Hodson v. Heuland*, L.R. [1896] 2 Ch. 428; 74 L.T. 811.
- (vii.) **H. L.**—*Covenant to Keep in Repair—Damages.*—Decision of the C. A. (see Vol. 21, p. 12, v.) affirmed.—*Conquest v. Ebbetts*, 75 L.T. 36.

**Licensing:—**

- (viii.) **Q. B. D. & C. A.**—*Licensing Acts—Refusal of Licence—Appeal—Non-Appearance of Objector—Costs.*—A person who is successful in an objection before justices to the renewal of a licence may be liable to the costs of a successful appeal, though he does not appear.—*Reg. v. The Justices of Kent and Others*, L.R. [1896] 2 Q.B.; 74 L.T. 618 and 75 L.T. 11.

- (i.) **Q. B. D.**—*Sale of Intoxicating Liquor to Drunken Person by Barman—Liability—Licensing Act, 1872, s. 13.*—The licensee of a public-house is guilty under sect. 13 of the Licensing Act if, in his absence and contrary to his standing instructions, his servant supplies intoxicating liquor to a drunken person.—*The Commissioners of Police v. Cartman*, L.R. [1896] 1 Q.B. 655; 74 L.T. 726.

### Limitations :—

- (ii.) **C. A.**—*Rent-Charge — Non-payment — Extinguishment — Statute of Limitations, 3 & 4 Wm. IV., c. 27, ss. 1, 2, 34.*—A rent-charge is a "rent" within the Statute.—*Jones v. Withers*, 74 L.T. 572.

### Local Government :—

- (iii.) **C. A.**—*District Council—Refusal to Approve Plans for new Buildings—Public Health Act, 1875.*—A district council was held not entitled to disapprove of plans of houses in new streets on the ground that they did not shew into what sewer the house drains were to communicate; and on the requirement that the street and outfall sewers should be constructed at the expense of the house owners.—*Reg. v. Tynemouth Rural District Council*, L.R. [1896] 2 Q.B. 219; 75 L.T. 86.
- (iv.) **C. A.**—*Street-paving Expenses—Apportionment—Arbitration—Enforcing Award—Public Health Act, 1875, ss. 150, 180 (sub-s. 14)—Arbitration Act, 1889, ss. 12, 24.*—An award of an arbitrator under sect. 150 of the Public Health Act, 1875, cannot be enforced under sect. 12 of the Arbitration Act, 1889.—*The Willesden Local Board v. Wright*, 75 L.T. 13.
- (v.) **C. A.**—*"Single Private Drain"—Public Health Act, 1875, s. 41—Amendment Act, 1890, s. 19.*—A private drain connecting houses of several owners with a public sewer was held to be within sect. 19 of the Public Health Act, 1890, rendering the owners liable under sect. 41 of the Public Health Act, 1875, for a nuisance in the drain.—*The Mayor of Eastbourne v. Bradford*, L.R. [1896] 2 Q.B. 205; 74 L.T. 763.
- (vi.) **C. A.**—*Bye-Law—Coal in Vehicle—Request to Weigh—Weights and Measures Act, 1889, s. 28.*—A bye-law made by the corporation of Blackburn under sect. 28 of the Act, to the effect that every person in charge of any vehicle carrying coal for sale in quantities not exceeding two hundredweight, should re-weigh the coal at the request of the purchaser or of anyone on his behalf, or of an inspector of weights and measures, or of a constable, was held to be unreasonable and bad.—*Alty v. Farrell*, L.R. [1896] 1 Q.B. 636; 74 L.T. 492.
- (vii.) **Q. B. D.**—*Obstruction on Highway—Removal—Public Health Act, 1875, s. 149—Local Government Act, 1894, s. 26.*—Encroachments upon a highway may be removed by the urban district council without first proceeding summarily or by indictment against the person causing the obstruction.—*Reynolds v. The Urban District Council of Presteign*, L.R. [1896] 1 Q.B. 604; 74 L.T. 422.
- (viii.) **H. L.**—*Public Conveniences Below the Surface of a Street—Public Health Act, 1875, s. 149—Tunbridge Wells Improvement Act, 1890, ss. 4, 98.*—Where a street is vested in an urban authority by the Public Health Act, the authority has only such property in the soil as is necessary for the maintenance of the highway, and have no right to make public conveniences below the surface.—*Mayor of Tunbridge Wells v. Baird and Others*, 74 L.T. 385.
- (ix.) **Q. B. D.**—*Differences Between District Councils—Mode of Adjustment—Local Government Act, 1888, ss. 57, 59 (4 and 6), 62 (2).*—Sect. 62 (2) of the Local Government Act, 1888, provides for the settlement by arbitration of differences between district councils "if no other mode . . . of determining such difference is provided by this Act."

The only other mode is by terms of the order issued by a county council under sect. 57 of the Act.—*An Arbitration Between the Sowerby Urban District Council and the Mytholmroyd Urban District Council*, 74 L.T. 313.

**Lunacy :—**

- (i.) **C. A.**—*Jurisdiction—British Subject Detained as Lunatic Abroad*—“Not so Found by Inquisition”—*Management of Estate—Lunacy Act*, 1890, s. 116, sub-s. 1 (c) 2.—An order for the management of the estate of a lunatic will not be made unless the lunatic is so found by inquisition or is resident within the jurisdiction.—*In re Florence Louise Watkins (a person of unsound mind)*, L.R. [1896] 2 Ch. 336; 74 L.T. 505.
- (ii.) **Nisi Prius**.—*Lunatic's Business Carried on by Committee—Personal Liability?*—A committee appointed by the Court to carry on the business of a lunatic is in a different position from that of a manager and receiver. The committee has no personal liability for credit given to the firm.—*Isaacs v. Chinery*, 74 L.T. 320.

**Marriage Settlement :—**

- (iii.) **C. A.**—*Divorce—Variation of Settlement—Death of Petitioner—Jurisdiction—Matrimonial Causes Acts*, 1859, s. 5, and 1878, s. 3.—On obtaining a decree absolute for dissolution of her marriage a husband, in terms of an arrangement with his divorced wife, filed a petition to vary the marriage settlement. Before any further step had been taken he died. Held, that the Court had no jurisdiction to make the order to vary on the application of the executor.—*Thomson v. Thomson*, 74 L.T. 801.

**Married Woman :—**

- (iv.) **Ch. D. & C. A.**—*Separate Estate—Restraint on Anticipation—Conveyancing Act*, 1881, s. 39.—The Court refused the application of a married woman to be relieved of a restraint on anticipation in order to pay off a debt contracted with a money lender.—*Pollard's Settlement*, L.R. [1896] 1 Ch. 901; 2 Ch. 552; 74 L.T. 374; 75 L.T. 116.
- (v.) **C. A.**—*Costs in Probate Action—Restraint on Anticipation—Caveat is not a “Proceeding” within Married Woman's Property Act*, 1893, s. 2.—Decision of Probate Division (see Vol. 21, p. 79, i.) affirmed.—*Moran v. Place*, L.R. [1896] P. 214; 74 L.T. 661.
- (vi.) **H. L.**—*Separate Estate—Restraint on Anticipation—Liability of Income*.—Income from property of a married woman subject to a restraint on anticipation can be taken in execution as soon as it is accrued due. Decision of C. A. reversed.—*Hood-Barrs v. Heriot*, L.R. [1896] A.C. 174; 74 L.T. 353.
- (vii.) **C. A.**—*Separate Estate subject to Restraint—Liability of Arrears Accruing due since Judgment—Married Women's Property Act*, 1882, ss. 1 and 19.—A judgment against a married woman with separate estate subject to restraint on anticipation cannot be enforced against arrears of income which have become due since the judgment. *Hood-Barrs v. Heriot* (see above) explained.—*Whiteley v. Edwards*, L.R. [1896] 2 Q.B. 48; 74 L.T. 720.

**Mayor's Court :—**

- (viii.) **C. A.** *Practice—Mayor's Court—Time for Appealing—The Mayor's Court of London Procedure Act*, 1857, s. 8, O. 59, r. 16.—The High Court has no jurisdiction to extend the time for giving notice of appeal in the Mayor's Court.—*Kirby v. The North British and Mercantile Insurance Co., Limited*, L.R. [1896] 2 Q.B. 99; 74 L.T. 723.

**Metropolis:—**

- (i.) **Q. B. D.**—*London Building Act, 1894, ss. 54 (8); 59; 75; 77 (8).*—One portion of a wall may be a party wall, and another portion an external wall only, not subject to the requirements of the London Building Act, 1894, affecting party walls.—*Drury v. The Army and Navy Auxiliary Stores, L.R. [1896] 2 Q.B. 271; 74 L.T. 621.*
- (ii.) **Q. B. D.**—*Nuisance Order—Costs—County Court—Summary Jurisdiction Act, 1818, s. 11; Public Health (London) Act, 1891, ss. 11 and 117.*—Sect. 11 of the Summary Jurisdiction Act, which prescribes that complaints or information under the Act shall be laid within six months from the time when the matter of complaint arose, applies to county court actions under sect. 11 of the Public Health Act for recovery of costs of enforcing a nuisance order.—*The Vestry of Hammersmith v. Lowenfeld, L.R. [1896] 2 Q.B. 278; 75 L.T. 182.*

**Metropolis Management:—**

- (iii.) **Q. B. D.**—*New Street with Houses on one side only—Paving New Footpath where Houses built on other side—Appointment—Metropolis Local Management Act, 1855, s. 105.*—At a time when a new street had houses upon the north side only, the cost of paving under sect. 105 of the Act was charged upon and paid by the owners of these houses. Subsequently houses were built and a footpath made on the south side. *Held*, that the local authority had no jurisdiction to compel further contribution from the owners on the north side.—*White v. The Vestry of the Parish of Fulham, 74 L.T. 425.*
- (iv.) **Q. B. D. & C. A.**—*Drainage—"Sewer"—Metropolis Management Act, 1855, ss. 68, 69, 74, 250—Amendment Act, 1862, ss. 47, 48.*—The owner of a block of houses, without order from the vestry and without approval by the Board of Works, drained them by one pipe running into a sewer in another street. *Held*, that the pipe was a "sewer" notwithstanding sects. 69 and 250 of the Metropolis Management Act, 1855, and was to be repaired by the Vestry.—*Reg. v. Vestry of St. Matthew, Bethnal Green, L.R. [1896] 2 Q.B. 95 and 319; 74 L.T. 701 and 75 L.T. 60.*

**Mines:—**

- (v.) **C. A.**—*Inspector of Mines—Authority to Agent to Lay Information—Metalliferous Mines Regulation Act, ss. 33 and 35.*—An inspector of mines can authorise an agent to lay information in a court of summary jurisdiction in the inspector's name for an offence under the Act.—*Foster v. Fyfe and Another, L.R. [1896] 2 Q.B. 104; 74 L.T. 784.*

**Mortgage:—**

- (vi.) **C. A.**—*Power of Sale to one of Several Mortgagors.*—In a mortgage by tenants in common, the mortgagee may sell to one of the mortgagors, without notice to the others, for the amount of principal, interest and costs, and even though the purchaser was manager for his co-mortgagors.—*Kennedy v. De Trafford, L.R. [1896] 1 Ch. 762; 74 L.T. 599.*
- (vii.) **C. D.**—*Equitable Mortgage—Fraud—Priorities—Conveyancing Act, 1881, ss. 2, 54, 55.*—A solicitor fraudulently procured a conveyance to himself of an equity of redemption by a trustee. The deed contained a receipt for purchase money though none was paid. The solicitor deposited the deed with his bankers, who had no notice of the fraud, as security for a loan. *Held*, that the deed was not void, though possibly voidable between the solicitor and the trustee; and that the bankers had priority over the trustee and the *cestuis que trust*.—*Lloyd's Bank, Limited v. Bullock, L.R. [1896] 2 Ch. 192; 74 L.T. 687.*

- (i.) **C. D.**—*Equitable Mortgage of Land within Yorkshire Registries Act, 1884, ss. 3, 7, 14*—*Subsequent Mortgage Registered first.*—To secure an advance of money two tenants in common of land subject to the Yorkshire Registries Act, deposited the title deeds of the estate with a bank. The bank did not register the charge. The solicitor to both of the tenants in common, who was aware of the claim of the bank, took a mortgage from one of them, unknown to the other, and registered his charge. *Held*, that as it was the solicitor's duty to obtain the sanction of his principal to any transaction which would give him a security over the property of his principal, the non-disclosure amounted to "actual fraud" within the meaning of the Act, and gave to the security held by the bank a priority over the mortgage held by the solicitor.—*Batteson v. Hobson*, L.R. [1896] 2 Ch. 403; 74 L.T. 689.
- (ii.) **C. A.**—*Consolidation.*—The right to consolidate mortgages which are united in title exists against the assignee of the equity of redemption of all the mortgages made before the unity of title.—*Pledge v. White and Others*, L.R. [1896] A.C. 187; 74 L.T. 323.

### Municipal Corporation :—

- (iii.) **Q. B. D.**—*Bye-law against Street Betting*—*Municipal Corporation Act, 1882, s. 23.*—A bye-law of the borough of Wolverhampton that "any person who shall frequent or use any street or other public place within the borough for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, with any person shall be liable to a penalty not exceeding £5," was held to be properly made under sect. 23 of the Act, and valid.—*Burnett v. Berry*, L.R. [1896] 1 Q.B. 641; 74 L.T. 494.

### National Schools :—

- (iv.) **Ch. D.**—*Trustees are "Owners"*—*Contribution to Cost of Making up Street*—*Public Health Act, 1875, ss. 4, 257; School Sites Act, 1841, s. 6.*—Trustees are "owners" within sect. 4 of Public Health Act, 1875, of school premises conveyed to them under sect. 6 of School Sites Act, 1841, and costs of metalling a street may be made a charge on the school buildings.—*Hornsey District Council v. Smith*, L.R. [1896] 2 Ch. 254; 74 L.T. 415.

### Negotiable Instruments :—

- (v.) **C. A.**—*Promissory Note "on Demand"*—*Maturity*—*Renunciation*—*Bills of Exchange Act, 1882, ss. 8 (4), 62 (1, 2), 83 (1), 89 (1, 2), 97 (2).*—A promissory note payable "on demand" matures as soon as it is made and delivered. The delivery up of a note to a devisee of the maker with the intention of renouncing it is not a renunciation either at law or in equity without writing.—*Edwards v. Walters*, L.R. 2 Ch. 157; 74 L.T. 396.

### Nuisance :—

- (vi.) **C. D.**—*Exhibition*—*Cabs*—*Nuisance Injunction.*—Where cabs assembled, under police supervision, near the plaintiff's residence at night, for the conveyance of persons quitting an exhibition, the Court refused an injunction against the proprietors of the exhibition.—*Germaine v. The London Exhibitions, Limited*, 75 L.T. 101.
- (vii.) **Q. B. D.**—*Overcrowding*—*Misdescription in Summons and Order*—*Public Health (London) Act, 1891, s. 2.*—On an order for abatement of a nuisance by overcrowding, a rule nisi for a certiorari was obtained

on the grounds that in the summons and the order the place where the overcrowding occurred was not described in the words of the Act as a "house," and that the persons who were on the premises were not "inmates." *Held*, that the rule should be discharged.—*Reg. v. Slade*; *e. p. Robinson*, 74 L.T. 656.

### Partnership:—

- (i.) **C. D.**—*Foreign Firm Located Abroad—Administration of English Estate of Deceased Partner—English Creditors—Conflict of Laws.*—The rule of English law that a creditor of a firm can proceed against the surplus separate estate of a deceased partner without first exhausting the partnership assets, holds good as to a partner of a foreign firm who dies in England possessed of property here, even though the rule be contrary to the law of the State in which the firm is domiciled.—*In re Doetsch*; *Matheson & Co. v. Ludwig*, 75 L.T. 69.
- (ii.) **Ch. D.**—*Articles of Partnership in Brewery—Death of one Partner—Purchase by Survivor—Goodwill—Tied Public-Houses.*—A deed of partnership for a fixed period in a brewery provided that on the death of one partner the survivor should have the option of purchasing the property and effects at a valuation. After the fixed period had expired, the partnership was continued without any agreement. On the death of a partner the survivor exercised his option. *Held*, that the goodwill must be valued separately, except as to tied public-houses.—*Page v. Ratlife*, 74 L.T. 843.

### Poor Law:—

- (iii.) **H. L.**—*Rating—Fine Art Society—Liability—6 & 7 Vict. c. 36, s. 1.*—An art society for the benefit of subscribers only, each of whom obtains a valuable return for his subscription is not exempt from being rated within sect. 1 of the Parochial Assessments Act. Judgment of Court below (see Vol. 19, p. 17, vi.) reversed.—*Overseers of the Savoy v. Art Union of London*, L.R. [1896] A.C. 296; 74 L.T. 497.
- (iv.) **C. A.**—*Rating—Beneficial Occupation.*—Decision of Divisional Court (see Vol. 21, p. 16, iii.) reversed.—*London County Council v. Churchwardens and Overseers of Lambeth*, L.R. [1896] 2 Q.B. 25; 74 L.T. 605.

### Post Office:—

- (v.) **Q. B. D.**—*Railway Companies—Postal Parcels—Outward and Inward Stations—Post Office (Parcels) Act, 1882.*—"Inwards station" is that to which a post office receptacle is directed. "Outwards station" is that at which the receptacle is delivered to the railway company.—*Reg. v. London & North Western Railway*, 74 L.T. 624.

### Power:—

- (vi.) **C. A.**—*Appointment to First Wife—Then to Children—Appointment to Second Wife Invalid.*—Decision of Court below (see Vol. 21, p. 80, ii.) affirmed.—*In re Hancock*; *Malcolm v. Burford Hancock*, L.R. [1896] 2 Ch. 173; 74 L.T. 658.

### Practice:—

- (vii.) **Q. B. D.**—*Writ—Incorrect Description of Defendant—O. ii., r. 3.*—A defendant, who resided in Ireland, was incorrectly described in a writ which was served upon him in England as of a place in the county of Lancaster. *Held*, that the writ was good.—*Smith v. Hammond*, L.R. [1896] 1 Q.B. 571; 74 L.T. 590.

- (i.) **C. A.**—*Case stated on Appeal from Order Granting Distress Warrant on Account of Poor Rate—Appeal from Queen's Bench—Judicature Act, 1873, s. 47.*—No appeal lies from a decision of the Queen's Bench Division on a case stated on appeal from an order for a distress warrant to enforce payment of poor rate.—*Seaman v. Burley*, L.R. [1896] 2 Q.B. 844; 75 L.T. 91.
- (ii.) **C. A.**—*Examination of Witnesses Abroad—Letters of Request to Foreign Tribunals—O. xxxvii., r. 6 (a).*—Letters of request to foreign tribunals for the examination of witnesses abroad should only be issued when the evidence to be obtained is material to the main question, not when it is merely collateral. Decision of Court below reversed.—*Ehrmann v. Ehrmann*, 75 L.T. 37.
- (iii.) **C. A.**—*Security for Costs—Plaintiff out of Jurisdiction—Application after Delivery of Defence—O. lv., r. 6.*—O. lv., r. 6, which provides that security for costs may be "given at such times as the Court or Judge shall direct," abrogates the old rule in Chancery that application for security must be made in a reasonable time.—*In re Smith; Bain v. Bain*, 75 L.T. 46.
- (iv.) **C. A.**—*Costs—Taxation—Action for Tort Remitted to County Court—Appeal after Order—County Courts Act, 1888, s. 66.*—An action for tort was remitted to the county court, but before the order was lodged the plaintiff took an interlocutory appeal to the Court of Appeal, and was allowed costs. *Held*, that these costs must be taxed by the officer of the High Court, and that sect. 66 of the County Courts Act, 1888, did not apply.—*D'Errico v. Samuel*, 75 L.T. 59.
- (v.) **C. A.**—*Judgment against a Married Woman—Examination in aid of Execution—O. xlii., r. 32.*—Where an order was made under O. xlii., r. 32, for the examination of a married woman, who was a judgment debtor, as to her separate estate not subject to restraint, it was *held* that the Court had no jurisdiction under the order to compel the examination "of any other person."—*Hood-Barrs v. Heriot*, L.R. [1896] 2 Q.B. 338; 75 L.T. 15.
- (vi.) **C. A.**—*Receiver before Probate—Caveat—Lis Pendens—Judicature Act, 1873, s. 25, sub-s. 8.*—Where a caveator who has been warned has merely entered an appearance, a receiver of the testator's property cannot be appointed on his application, as there is no *lis pendens*.—*Salter v. Salter*, 75 L.T. 7.
- (vii.) **C. A.**—*Service out of Jurisdiction—Notice of Motion with Notice of Writ—O. xi., r. 1; O. lii., r. 9.*—Leave to serve notice of motion, with notice of writ, out of the jurisdiction upon foreign defendants, will be given without prejudice to any question which may be raised on the order.—*Overton & Co. v. Burn, Love & Sons*, 74 L.T. 776.
- (viii.) **C. A.**—*Interrogatories—Member of Company—O. xxxi., r. 4.*—The plaintiff sought to deliver interrogatories to the defendant company to be answered by a particular individual, a member of the company. An order was made that interrogatories might be delivered for answer by "the proper officer of the company." *Held*, that the order was properly made, and that before application was made for leave to deliver interrogatories to a member of a company, notice should be served upon him.—*Chaddock v. The British South Africa Co.*, L.R. [1896] 2 Q.B. 153; 74 L.T. 755.
- (ix.) **Q. B. D.**—*Originating Summons to revoke submission to Arbitration—Appeal—Judicature Act, 1894, s. 1 (4).*—An appeal from the decision of a Judge in Chambers on an originating summons for leave to revoke a submission to arbitration within sect. 1 of the Arbitration



Act, 1889, is to the Court of Appeal not to the Divisional Court.—*An Arbitration between the Portland Urban District Council and Tilly & Sons*, L.R. [1896] 2 Q.B. 98; 74 L.T. 708.

- (i.) **C. A.**—*Death of Plaintiff in Action for Mandamus—Survival of Cause of Action*—O. xvii., r. 1, 4.—Where a plaintiff died after commencing an action for a mandamus to enforce an alleged statutory duty, it was held that the cause of action survived and that the plaintiff's executors were properly added as plaintiffs.—*Peebles v. Oswaldtwistle Urban District Council*, L.R. [1896] 2 Q.B. 159; 74 L.T. 721.
- (ii.) **C. A.**—*Discovery—River Pollution Prevention Acts, 1876, ss. 3, 10, 11; and 1893*.—A defendant in an action for injunction is not privileged from giving discovery on the ground that it might subject him to a penalty if the penalty can be incurred only by disobeying the injunction if granted.—*The Derbyshire County Council v. The Mayor and Aldermen of Derby*, L.R. [1896] 2 Q.B. 53; 74 L.T. 747.
- (iii.) **C. A.**—*Libel—Interrogatories as to Circulation of a Newspaper*.—Where it is admitted that the circulation of a newspaper which contained an alleged libel was considerable, interrogatories as to the number of copies circulated will not be allowed.—*Whittaker v. The Scarborough Post Newspaper Company*, L.R. [1896] 2 Q.B. 148; 74 L.T. 553.
- (iv.) **C. A.**—*Statute of Frauds—Pleading*—O. xix., r. 15.—R. 15 requiring the Statute of Frauds to be pleaded if it is relied on will be construed strictly.—*Odham Brothers v. Brunning*, 74 L.T. 370.
- (v.) **C. A.**—*Scotch Bank—Inspection of Books*.—Under sect. 7 of the Act the High Court can make an order for the inspection of the books of a Scotch bank.—*Kissam v. Link*, L.R. [1896] 1 Q.B. 574; 74 L.T. 368.
- (vi.) **H. L.**—*Procedure—Special Case—Appeal*—O. xxxiv., r. 1.—Where a special case raises only questions of fact an appeal is not allowed.—*Burgess v. Morton*, L.R. [1896] A.C. 136.
- (vii.) **Ch. D.**—*Discovery of Documents from a Co-Defendant*—O. xxxi., r. 12.—Discovery of documents will be granted under O. xxxi., r. 12, to one defendant from a co-defendant when there is some right between them to be adjusted in the action.—*The Alcoy & Gandia Railway and Harbour Co., Limited v. Greenhill*, 74 L.T. 345.
- (viii.) **C. A.**—*Costs in Action Paid to Solicitor—Judgment Reversed*.—A solicitor will not be required to repay costs which have been paid to him by the other side under a judgment of the Court of Appeal in favour of his client, although that judgment is reversed by the House of Lords.—*Hood-Barrs v. Heriot*, L.R. [1896] 1 Q.B. 610; 74 L.T. 372.
- (ix.) **Ch. D.**—*Costs—Set-off—County Court Action—High Court*—O. lv., r. 14.—The Court refused an action, made on the ground that the plaintiff was impecunious, to set-off against costs in a judgment which the defendant had obtained in the county court, costs which he had incurred in an unsuccessful motion for a *certiorari* to remove the action to the High Court.—*Hassell v. Stanley*, L.R. [1896] 1 Ch. 607; 74 L.T. 375.
- (x.) **Ch. D.**—*Practice—Title of Writ and of Statement of Claim—Administration*.—Where a plaintiff is suing on an administration action on behalf of himself and all the creditors, the statement of claim must be so intitled.—*Tottenham v. Tottenham; in re Tottenham*, L.R. [1896] 1 Ch. 628; 74 L.T. 376.
- (xi.) **C. D.**—*Costs—Taxation—Minimum Fee—General Order under Solicitors Remuneration Act, 1881, schd. 1, part 2, r. 5, schd. 1, part 1, r. 8*.—A lessee obtained a lease for lives at a rental of 12s. 1d., paying a fine of £12 1s. 8d. The lessor's solicitor charged £7 11s., and on application

sent in items amounting to a larger sum, writing below the total "say £7 11s." The taxing-master held that under the above general orders, the solicitor was entitled to more than the sum claimed and allowed him the costs of taxation.—*In re Hellard*, L.R. [1896] 2 Ch. 229; 74 L.T. 457.

- (i.) **C. D.**—*Joinder of Causes of Action—Setting Aside Mortgage—Redemption—Recovery of Land—Application to Strike out Statement of Claim*—O. xviii., r. 2; O. lxx., r. 2.—An application to set aside any proceeding for irregularity" under O. l., r. 2, is not too late, though made after appearance (*Mulkeson v. Doerks* not followed). A claim to set aside a mortgage or to redeem it can be joined in the alternative with a claim for recovery of the land without leave under O. xviii., r. 2.—*Hunt v. Worsfold*, L.R. [1896] 2 Ch. 224; 74 L.T. 456.
- (ii.) **C. D.**—*Originating Summons—Breach of Trust*—O. lv., r. 3.—In an action commenced by originating summons, inquiries were directed which comprised an investigation into a breach of trust, and an order was made for a common account of personal estate. *Held*, that the inquiry as directed went too far, and if it had been objected to at the time would not have been proceeded with; and that if the taking of the account required *vivâ voce* evidence, further application should be made.—*In re Stuart; Smith v. Stuart*, 74 L.T. 546.
- (iii.) **P. D.**—*Summary Jurisdiction (Married Women) Act, 1895—Appeals—Notes of Evidence and of Grounds of Decision—Costs*.—The Divisional Court will not interfere in questions of fact unless the Court of Summary Jurisdiction was wrong in its conclusion. In administering the Summary Jurisdiction (Married Women) Act, 1895, care must be taken not to interfere too much in matrimonial life. Magistrates' clerks should take notes of evidence and should shew upon what grounds of fact or or law the decisions were based. The costs of a proper note ought to be allowed.—*Harling v. Harling*, 74 L.T. 559.
- (iv.) **H. L.**—*Parties—Joinder of Defendants*—R.S.C. 1883, O. xvi., r. 4.—(See Vol. 21, p. 44, iv.) Affirmed.—*Sadler v. Great Western Railway Co.*, 74 L.T. 561.
- (v.) **C. A.**—*Proceedings under the Rivers Pollution Prevention Act, ss. 3 and 10*.—Where proceedings had been commenced under Rivers Pollution Prevention Act, 1876, in a county court for an order requiring a corporation to abstain from causing sewage to flow into a stream, it was held that the proceedings were not of a criminal or penal nature, and that complainants might interrogate the corporation.—*In re The County Council of Derbyshire and the Mayor, &c., of the Borough of Derby*, L.R. [1896] 2 Q.B. 297.
- (vi.) **P. C.**—*Insurance—Condition in Policy—Non-Suit*.—A plaintiff was held to have been rightly non-suited for not having complied with a condition in a policy to give full particulars within a given time of a fire loss, when his own evidence shewed that he could have done so.—*Hiddle v. National Fire Insurance Co. of New Zealand*, L.R. [1896] A.C. 372.
- (vii.) **C. A.**—*Bankruptcy—Appeal from Receiving Order—Security for Costs—Bankruptcy Rules, 1886, r. 131*.—The fact that a respondent's out-of-pocket costs on a debtor's appeal from a receiving order will exceed £20 is not a ground for increasing the amount of deposit required from the debtor under rule 131.—*In re Phillips; s. p. The Treboeth Brick Co.*, L.R. [1896] 2 Q.B. 122.
- (viii.) **C. A.**—*Mortgage—Attornment—Power to Enter—Tenancy at Will*—O. xiv.—In an action by a mortgagee to recover possession under a deed which contained an attornment clause with a power to determine

the tenancy without notice, it was held that the claim was founded on the determination of a tenancy at will and not on forfeiture, and that the writ could be specially endorsed.—*Kemp v. Lester*, L.R. [1896] 2 Q.B. 162.

### Principal and Agent:—

- (i.) **C. A.**—*Receiver appointed by Trustees for Debenture Holders—Order to Wind-up Company—Goods ordered by Agent subsequently—Liability of Trustees.*—Trustees for debenture holders in possession of the property of a company were held liable, as undisclosed principals, for goods supplied, after a winding-up order, to an agent appointed by them under powers of a deed, who was to be "the agent of the company who alone should be liable for his acts." (*Dissentiente*, Rigby, L.J.).—*Gaskell and Another v. Gosling and Another*, L.R. [1896] 1 Q.B. 669; 74 L.T. 674.

### Probate:—

- (ii.) **P. D.**—*Chain of Executorship—Missing Executor to whom Power Reserved—Death of Acting Executor—Citation.*—A grant of administration *de bonis non* was refused where one executor to whom power had been reserved had not been heard of for 14 years and the other to whom probate had been granted had died before he had fully administered, as the chain of executorship could be continued in the executor of the deceased executor, and citation could be effected on the missing executor by advertisement.—*In the goods of Reid*, L.R. [1896] P. 129; 74 L.T. 462.
- (iii.) **P. D.**—*Foreign Will—Probate of Copy.*—A German having personal property in England died domiciled in Wurtemberg where his will was proved, his wife being the equivalent of executrix. By the local law the custodian of the will is forbidden to let it leave his custody. Held that probate of a copy of the will might be granted.—*In the goods of Von Linden*, L.R. [1896] P. 148.
- (iv.) **P. D.**—*Presumption of Death—Filing Letter.*—The Court granted an application for probate and for leave to depose to death of testator on presumptive evidence, subject to the filing of a letter from an insurance company, in which the testator had insured his life, stating that they would not interfere in the proceedings.—*In the goods of Saul*, L.R. [1896] P. 151.

### Promissory Note:—

- (v.) **Q. B. D.**—*Unnecessary Provisions in Document Described as Promissory Note—Bills of Exchange Act, 1882, s. 83, sub-s. 3.*—Where a document contained a clause that "no time given to, or security taken from, or composition or arrangements entered into with either party hereto, shall prejudice the rights of the holder to proceed against any other party," it was held that it was not a promissory note and could not be sued on as one.—*Kirkwood v. Smith*, L.R. [1896] 1 Q.B. 582; 74 L.T. 423.

### •Public Health:—

- (vi.) **C. A.**—*House Refuse—Refusal to Permit Removal—Penalty—Public Health (London) Act, 1891, ss. 16, 30, 31, 116.*—The London County Council made a bye-law that the sanitary authority should remove the refuse of houses in their district once a week. A householder refused to admit the men sent to perform the duty. Held, that he was guilty of "wilfully obstructing" within the meaning of sect. 116 of the Public Health Act and was liable to the penalty imposed by the section.—*Borrow v. Howland*, 74 L.T. 787.

# **Railway:—**

- (i.) **R. & C. C.**—*Carriage of Goods—Duty of Company to Disintegrate Charges—Railway and Canal Traffic Act, 1888, s. 33, sub-s. 3.*—Sect. 33, sub-sect. 3 of the Railway and Canal Traffic Act, 1888, requires a railway company to distinguish in an account rendered the charge for conveyance from terminal charges whether the total claim exceeds or falls below the maximum authorised for conveyance alone; but if it falls below, it is sufficient for the company to state formally that no part of the claim is for terminals.—*New Union Mill Co. v. Great Western Railway Co.*, 74 L.T. 791.
- (ii.) **R. & C. C.**—*Increase of Rate—Cartage—Jurisdiction of Railway Commissioners—Railway and Canal Traffic Act, 1894, s. 1, sub-s. 1.*—The Railway Commissioners have jurisdiction to determine a complaint against a railway company of the unreasonableness of an increase in its rates or charge for cartage since the last day of 1892.—*The Mansion House Association on Railway Traffic v. London and North-Western Railway Co.*, L.R. [1896] 1 Q.B. 273; 74 L.T. 463.
- (iii.) **C. A.**—*Level Crossing—Obligation to Build Bridge—Railway Clauses Consolidation Act, 1845, ss. 46, 61.*—The Railway Clauses Act does not impose on a railway company whose line crosses a public footpath the obligation to carry the path over the line or the line over the path by means of a bridge.—*Reg. v. Bexley Heath Railway Co.*, L.R. [1896] 2 Q.B. 74; 74 L.T. 540.
- (iv.) **Q. B. D.**—*Accommodation Works—Fence Constructed more than Five Years after Opening of Railway—Railway Clauses Act, 1845, ss. 68, 73.*—Where damage had arisen through the defective state of a fence erected by a railway company more than five years after the opening of the railway, it was held that sect. 73 of the Railway Clauses Act did not relieve the company from the obligation to keep the fence in repair.—*Dixon v. Great Western Railway Co.*, L.R. [1896] 2 Q.B. 333.

# **Rating:—**

- (v.) **H. L.**—*Poor Rate—Appeal to Quarter Sessions—Assessment Committee as Respondents—Consent of Guardians Necessary—Union Assessment Committee Amendment Act, 1864, s. 2.*—If an assessment committee appear as respondents in an appeal to quarter sessions against a rate they will not be entitled to costs unless they have previously obtained the consent of the guardians to their appearing.—*Assessment Committee of West Ham Union v. London County Council and Others*, 75 L.T. 1.
- (vi.) **Q. B. D.**—*Poor Rate—Joint Occupation for Crown Purposes and for Local Purposes—Ratability.*—Buildings occupied jointly for purposes of a county council and for Crown purposes are ratable in so far as they are not occupied for purposes of the Crown.—*County Council of Middlesex v. Assessment Committee of St. George's Union*, L.R. [1896] 2 Q.B. 143; 75 L.T. 153.

# **Rent Charge:—**

- (vii.) **Q. B. D.**—*Eccelesiastical Augmentation—Rent Charge Greater than Annual Value.*—Where a rent charge has been granted in augmentation of a curacy under 1 and 2 William IV., c. 45, the owner of the land is liable for the full amount of the charge, even if it should exceed the annual value of the land.—*Pertwee v. Townsend*, L.R. [1896] 2 Q.B. 129; 75 L.T. 104.

**Riparian Rights:—**

- (i.) **C. A.**—*River Bed—Alteration—Adjoining Lands—Accretion.*—A portion of the bed of a river, which becomes dry during part of the year, does not by accretion become the property of the adjoining riparian owner.—*Hindson v. Ashby*, L.R. [1896] 2 Ch. 1; 74 L.T. 327.

**Revenue:—**

- (ii.) **Q. B. D.**—*Postage Stamps—Possession of Die—"Lawful Excuse"*—*Post Office (Protection) Act, 1884, s. 7.*—The respondent, whose *bona fides* was admitted, had in his possession, for purposes of illustration, a die capable of making a representation of a current colonial postage stamp. *Held*, that he had no "lawful excuse," and was liable to the penalty imposed by sect. 7 of the *Post Office (Protection) Act, 1884.*—*Dickens v. Gill*, L.R. [1896] 2 Q.B. 310; 75 L.T. 32.
- (iii.) **Q. B. D.**—*Income Tax—Colliery—Contributions to Strike Compensation Fund—Income Tax Act, 1842, s. 100, sch. D.*—The Court disallowed a claim of colliery owners in income tax returns to deduct from profits the average excess of their contributions to a strike indemnity fund over the amounts received by them as indemnities.—*The Rhymney Iron Co., Limited v. Fowler*, L.R. [1896] 2 Q.B. 79.
- (iv.) **Q. B. D.**—*Excise Licence—Secretary to Watch Club—Liability—Bond fide Traveller Revenue Act, 1867, ss. 1, 3, 17.*—The respondents were secretaries of provincial "watch clubs," the members of which paid a weekly sum, and in consideration the successful drawer at a periodical ballot received a watch from the proprietors who were London tradesmen. *Held*, that the respondents came within sect. 17 of the *Revenue Act, 1867*, as persons who "solicit, take, or receive any order" for excisable articles without a licence, and did not come within the exemption as *bond fide* travellers.—*Killick v. Graham; Linton v. Burchell*, L.R. [1896] 2 Q.B. 196; 75 L.T. 29.
- (v.) **Q. B. D.**—*Stamp Duty on "Annuity or Sum Periodically Payable"*—*Stamp Act, 1891, Schedule.*—By an agreement terminable by three months' notice the manager of an hotel was to receive all the profits on paying a weekly sum to the proprietor. *Held*, that the "sum periodically payable" within the terms of the *Stamp Act* was the sum payable for one week only.—*Clifford and Another v. Commissioners of Inland Revenue*, L.R. [1896] 2 Q.B. 187; 74 L.T. 699.
- (vi.) **Q. B. D.**—*Stamp Duty—Licence to Use Patent in one of the Colonies—Stamp Act, 1891, s. 59, sub-s. 1, sch. 1.*—A share of a patent and of a licence to use the patent in New South Wales was held to be an interest on property within the meaning of sect. 59, sub-sect. 1, of the *Act.*—*The Smelting Company of Australia v. The Commissioners of Inland Revenue*, L.R. [1896] 2 Q.B. 179; 74 L.T. 694.
- (vii.) **C. A.**—*Dog Licence—Exemption—Jurisdiction of Justices—Customs and Inland Revenue Act, 1878, s. 22—Summary Jurisdiction Act, 1879, s. 16.*—The granting of a certificate of exemption to the owner of a dog is within the discretion of the commissioners, and the justices have no jurisdiction to review their decision. The refusal to take out a dog licence is not an offence of a trifling nature within sect. 16 of *Summary Jurisdiction Act, 1879.*—*Phillips v. Evans*, L.R. [1896] 1 Q.B. 305; 74 L.T. 314.
- (viii.) **H. L.**—*Income Tax—Trade exercised within the United Kingdom—Assessment through Agent—Income Tax Acts, 1853, sch. D.; 1842, s. 41.*—Where orders were obtained within the United Kingdom by an agent there resident for a merchant in France who shipped the goods thence at the purchaser's risk, issued the invoices in his own name, and

generally received the purchase money direct, it was held (reversing the judgment of the Court below—see Vol. 20, p. 54, iv.—Lord Morris dissenting), that the foreign merchant did not exercise his trade within the United Kingdom, so as to bring him within sched. D. of the Income Tax Act, 1852.—*Grainger & Son v. Gough*, L.R. [1896] A.C. 325; 74 L.T. 435.

### Scotch Law:—

- (i.) **H. L.**—*Portions to Children*.—The rule of English law against double portions to children is not applicable to Scotland.—*Johnstone v. Haviland*, L.R. [1896] A.C. 95.

### Settled Land:—

- (ii.) **C. D.**—*Power to Trustees to purchase particular Land—Settled Land Act, 1882, s. 33*.—A power to trustees to purchase certain land at the request of the life tenant renders personal property in their hands “liable” to be so laid out within the meaning of sect. 33 of the Act.—*In re Hill's Settled Estates*; *Hill v. Pilcher*, L.R. [1896] 1 Ch. 962; 74 L.T. 460.
- (iii.) **C. D.**—*Tenant for Life Lunatic—Annuity to Remainderman Overpaid—Claim for Return by Representative of Life Tenant*.—By orders in lunacy an annuity was ordered to be paid out of settled estate to a remainderman for a limited period. The annuity was continued in error beyond the period and the remainderman mortgaged his estate. *Held*, that the personal representative of the life tenant was entitled to retain the overpayments with interest, notwithstanding the mortgage.—*In re Langham*; *Otway v. Langham*, 74 L.T. 611.
- (iv.) **C. D.**—*Jointure—Portions*.—A power of jointuring does not cover the creation of a rent charge in favour of the wife during the life of the husband. But a power conferred on the husband to charge the settled estate with portions for the children and with interest thereon by way of maintenance, may enable him to charge the estate, with payment to himself as guardian of the children of interest on their expectant portions.—*In re De Hoghton*; *De Hoghton v. De Hoghton*, L.R. [1896] 2 Ch. 385; 74 L.T. 613.
- (v.) **C. D.**—*Will—Incumbered and Unincumbered—Estates Devised as a whole—Tenant for Life and Remainderman*.—Where a testator devised incumbered and unincumbered estates as a whole to a tenant for life who mortgaged his interest to an insurance company who foreclosed, the company were held not to be entitled to give up the incumbered portions which were profitless, but to be bound to apply the income of the whole to paying off the interest of the mortgages on the incumbered parts.—*Frewen v. The Law Life Assurance Co.*, L.R. [1896] 2 Ch. 511; 75 L.T. 17.

### Settlement:—

- (vi.) **Ch. D.**—*Mortgage for a Term—Premature Repayment with a Forfeit—Rights of Tenant for Life and Remainderman to Accretion*.—The trustees of a fund, which was settled on a person for life with remainder in fee to others, invested it on mortgage with a covenant that it should remain undisturbed for a fixed period. By agreement it was redeemed before the period had expired on payment of a forfeit of one year's interest, in addition to the interest accrued due. *Held*, that the additional sum was capital and belonged to the remaindermen.—*In re Searancke*; *Simonds v. Huntington*, 74 L.T. 330.

- (i.) **P. D.**—*Variation of Settlement—Extinguishment of Divorced Parents' Interest—Acceleration of Infant's Interest.*—The Court on the ground that as infant's interest would be thereby accelerated, extinguished the interest on a marriage settlement of a husband from whom the wife had obtained a divorce with custody of the only child, notwithstanding that there was a power to her in such circumstances to raise a sum which would nearly exhaust the value of the entire estate.—*Creagh v. Creagh*, 74 L.T. 480.
- (ii.) **C. D.**—*Determinable Life Interest—Settlor Subsequently Bankrupt—Forfeiture.*—By a marriage settlement the settlor assigned property to trustees upon trust to pay to him until he should die, become bankrupt or assign or incur the income, or do anything whereby any part of it would become payable to any other person. He became bankrupt after the sole surviving trustee had advanced to him part of the trust funds on a covenant to repay and indemnify. After the bankruptcy the trustee was compelled to make good the trust fund. On a question arising, it was held that the settlor's life interest had not determined previously to his bankruptcy.—*In re Brewer's Settlement; Morton v. Blackmore*, L.R. [1896] 2 Ch. 503; 75 L.T. 177.

### Ship :—

- (iii.) **C. A.**—*Collision—Raising Wreck—Expenses of Harbour Board and Conservators—Basis of Calculation—Damages in Nature of Demurrage.*—The Mersey Docks and Harbour Board who were also the Conservancy Commissioners of the Mersey, were held entitled to recover as part of their damages the cost price of raising a lightship and a dredger, their property, which had been sunk in the harbour of Liverpool by the negligence of the defendants, and it was also held that interest on the original cost to the Board of their plant employed in the work was to form part of this cost price. But no allowance was made to them for the loss of use of the dredger while it was disabled. The rule laid down in the case of *The Harrington* followed.—*The Emerald; The Greta Holme*, L.R. [1896] P. 192; 74 L.T. 645.
- (iv.) **Q. B. D.**—*Charter Party—"Safe Port"—Evidence of Custom.*—By a charter party a ship was to discharge all her cargo at one port to be named by the charterers, which was to be a safe port where she could enter dock safely and lie afloat at all times. The ship was ordered to discharge at Gloucester, but being of too great a draught to proceed thither, discharged all her cargo at the nearest safe point. Held, that the port named was not "safe" within the meaning of the charter party, and that evidence of custom of similar ships to lighten before proceeding to Gloucester was inadmissible.—*Reynolds & Co. v. Tomlinson and Another*, L.R. [1896] 1 Q.B. 586; 74 L.T. 591.
- (v.) **C. A.**—*Marine Insurance—Perils of the Sea—Judgment in Salvage Suit—Evidence.*—At the request of the master of a steam-vessel which had consumed nearly all its coal, but which could have proceeded under sail, towage was rendered to the incapacitated steamer. Salvage services were subsequently recovered. Held, that there had not been a loss by perils of the sea within the meaning of a time policy of insurance; and that a judgment against a shipowner for salvage award is not evidence of loss by perils of the sea.—*Ballantyne & Co. v. Mackinnon*, 75 L.T. 95.
- (vi.) **C. A.**—*Collision—Compulsory Pilotage—London District—Merchant Shipping Acts, 1854, s. 379 (3); 1894, s. 625 (3)—Privy Council Order, Dec. 21st, 1871.*—A British ship, loaded at Cardiff for the River Plate, and on the return voyage landed cattle in London, and took the rest of the cargo to Rotterdam. Held, that she was within the terms of sect. 625, sub-sect. 3, of the Merchant Shipping Act, 1894, as trading from a

port in the London district to a port in Europe north and east of Brest, and, therefore, was exempt from compulsory pilotage.—*The Rutland*, 75 L.T. 48.

- (i.) **P. D.**—*Shipwrecked Passengers—Forwarding by other Vessels—Salvage—Agency of Master.*—Where at the request of the master of a stranded vessel the passengers were conveyed to their destination by other vessels, it was held that the life salvors had no claim against the owners of the stranded vessel, who were not under any obligation to forward the passengers to their destination after the ship was disabled, and that the master made the request as the agent of the passengers.—*The Mariposa*, 75 L.T. 54.
- (ii.) **Q. B. D. & C. A.**—*Light Dues—Horses and Cattle on Deck—Measurement—Merchant Shipping Act, 1876, s. 23.*—Horses and cattle carried on deck come within the words "other goods" in the 23rd sect. of the Merchant Shipping Act, 1876, and from vessels arriving in port so freighted the Trinity House are entitled to light dues calculated on the rectangular space occupied by the animals.—*Richmond Hill Steamship Co. v. Corporation of Trinity House*, L.R. [1896] 1 Q.B. 493; 2 Q.B. 184; 74 L.T. 380 and 75 L.T. 8.
- (iii.) **P. D.**—*Practice—Separate Salvors—Joinder of Claims—O. xvi., r. 1.*—The practice of the Admiralty Court permits several salvors to join their claims in one action.—*The Maréchal Suchet*, L.R. [1896] P. 233; 74 L.T. 789.
- (iv.) **P. D.**—*Wages—Master's Lien—Mortgagee in Possession.*—A master's lien for wages does not take priority of a mortgage debt the payment of which he has personally guaranteed.—*The Bangor Castle*, 74 L.T. 768.
- (v.) **P. D. & C. A.**—*Marine Insurance "at and from"—Vessel Lost before Arrival at Loading Port.*—An insurance was effected on freight "at and from" any port on the west coast of South America. The policy was "to cover the freight from the time of the engagement of the goods, or after a shipping order has been issued, by the agent or his broker." While on her way to load at a port within the terms of the policy, the ship was lost by perils insured against. Held, that the engagement clause must be construed, subject to the "at and from clause," and as the vessel had not arrived at a loading port, the risk had never attached.—*The Copernicus; Liverpool, Brazil and River Plate Steam Navigation Co. v. Holmes*, L.R. [1896] P. 154, 237; 74 L.T. 431, 757..
- (vi.) **P. D. & C. A.**—*Collision—Bye-Laws of Harbour of Newport, 1894, Arts. 12 & 13—Regulations for Preventing Collisions at Sea, Art. 16.*—Although an inward bound steamer had committed a breach of the bye-laws of the harbour of Newport in failing to enter the harbour as directed by Art. 13, it was held that this had not contributed to a collision which took place with an outward bound steamer, and that the latter was alone to blame.—*The Winstanley*, 74 L.T. 432 and 75 L.T. 133.●
- (vii.) **H. L.**—*Charter Party—Duty of Charterer to be Ready with Cargo.*—A charterer is not bound in all cases to be ready with cargo to meet the possibility of an opportunity occurring for a ship to load out of her turn.—*Little v. Stevenson & Co.*, L.R. [1896] A.C. 108; 74 L.T. 529.
- (viii.) **Q. B.**—*Marine Insurance—Life Salvage.*—The crew, but no part of cargo, were rescued from a vessel which was insured in a Ship-owners' Protection Association against such risks as were not capable of being assured against by the usual form of Lloyd's policy, and the owner had to pay a sum of money to the life salvors. Held, that simple life salvage is not covered by the ordinary Lloyd's policy of



insurance, and that plaintiff could recover against the Protection Association.—*Nourse v. The Liverpool Sailing Ship Owners' Mutual Protection and Indemnity Association, Limited*, L.R. [1896] 2 Q.B. 16; 74 L.T. 317, 543.

- (i.) **Q. B. D.**—*Bill of Lading—Contraband of War—Restraint of Princes—Duty of Master of Ship.*—By the terms of a bill of lading explosives contraband of war were to be delivered at Yokohama or as near thereto as the vessel could safely get having regard to the restraint of rulers, princes and people; but if the master considered the port of discharge unsafe by reason of war the goods were to be landed at the nearest safe and convenient port and thereupon the ship's responsibility was to cease. The vessel arrived at Hong Kong during the war between China and Japan, and being, while carrying a contraband cargo, in peril of capture by Chinese warships the master landed the goods and proceeded on his voyage. *Held*, that the well founded fear of seizure was a restraint within the terms of the bill of lading; that under the circumstances Hong Kong was the nearest safe and convenient port; and that landing the goods there was a proper discharge of the master's duty.—*Nobels Explosives Co., Limited v. Jenkins & Co.*, L.R. [1896] 2 Q.B. 326; 75 L.T. 163.

### Solicitor:—

- (ii.) **C. D.**—*Evidence—Statement by one Party to Solicitor of other Party—Privilege.*—Statements made by one party in a joint undertaking to the solicitor of the other party in an interview, had at the latter's request, were held to be privileged.—*Rochevoucauld v. Boustead*, 74 L.T. 783.
- (iii.) **H. L.**—*Company—Costs of Private Act—General and Separate Capital.*—Decision of C. A. (see Vol. 20, p. 90, vii.) affirmed.—*Nichols v. North Metropolitan Railway and Canal Co.*, 74 L.T. 744.
- (iv.) **C. D. & C. A.**—*Costs—Common order to Tax—Set-off—Counsel's fees.*—Under a common order to tax the solicitor must give credit for all such sums received by him in his capacity of solicitor or agent of his client, as he is legally or equitably liable to pay over to his client and against which, if sued by the client, he would set-off his costs. But against a bill of costs, for which a member of the bar is liable as a client, the solicitor cannot be required to set-off fees which he has received on behalf of the client acting as counsel in another matter.—*In re Le Brasseur and Oakley; e. p. Terrell*, L.R. [1896] 2 Ch. 487; 74 L.J. 526, 717.
- (v.) **Ch. D.**—*Fund in Court—Payment out on Fraudulent Petition—Unauthorised use of Name of Firm of Solicitors—Condonation by one Partner—Liability of Both.*—A sum of money was obtained from the Paymaster-General by means of a fraudulent petition, to which the name of a firm of solicitors had, without their knowledge, been attached. One of the partners was subsequently informed that the firm's name had been used in a merely formal business, and without making any enquiry into the nature of the business, accepted a cheque for fees which he handed to his partner, who paid it to the firm's account. *Held*, that both partners were jointly and severally liable for all loss which occurred to the misappropriated fund from the date when the one partner condoned the misuse of the firm's name.—*Marsh v. Joseph*, 74 L.T. 412.
- (vi.) **Ch. D.**—*Solicitors Act, 1843, ss. 37, 41—Solicitors Remuneration Act, 1881, s. 8—Delivery of Bill—Cash Account—Payment—Taxation.*—The delivery of a cash account without items is not equivalent to the delivery of a bill of costs, and the Court has power to order the delivery of a bill whether or not there has been payment, even though it

may not have jurisdiction to refer the bill for taxation. Decision of Court below affirmed.—*In re Baylis*, L.R. [1896] 2 Ch. 107; 74 L.T. 337 and 506.

- (i.) **C. A.**—*Costs—Order of Course to Tax One of Several Bills.*—Where a solicitor who had delivered separate bills to his client on distinct matters wrote that he treated the sums which he had received on account as a complete discharge and gave up all documents, it was held that a common order of course to tax one only of the bills which the client had subsequently obtained was properly made.—*In re Ward (a Solicitor)*, L.R. [1896] 2 Ch. 31; 74 L.T. 567.

### Stock Exchange:—

- (ii.) **H. L.**—“Differences”—“Cover”—*Gaming and Wagering Contract—Gaming Act, 1845, s. 18.*—Where a Stock Exchange transaction is intended to end in the payment of differences it is not removed from being a gaming and wagering contract by a provision that either party may require delivery of stock; and securities deposited as “cover” may be recovered by action. Judgment of C. A. affirmed.—*Universal Stock Exchange v. Strachan*, L.R. [1896] A.C. 166; 74 L.T. 468.

### Succession Duty:—

- (iii.) **Q. B. D.**—*New Succession—Consideration of “Money or Money’s” Worth*—*Succession Duty Act, 1853, ss. 2, 15, 17, 18.*—The interests of beneficiaries under a will were conveyed by deed to trustees in trust amongst other things to (1st) pay an annuity for life to F. Lord W. during the life of another, and (2nd) after that other’s death to “continue to pay the said annuity” to the person for the time being holding the title of Lord W. Held, that the annuity in the 2nd clause was not a continuation of the annuity provided by the 1st clause, but created a new succession; and that the circumstances shewed that the deed was not made in consideration of “money or money’s worth” so as to be exempt from duty under sect. 17 of the Act.—*The Attorney-General v. Baron Wolverton*, 75 L.T. 71.

### Trade Mark:—

- (iv.) **C. D.**—*Registration—Portrait of Manufacturer as Distinctive Device—Infringement—Delay—Patents, &c., Act, 1888, s. 10, sub-s. 1 (c).*—The plaintiff registered the name of a lozenge with a device of his own portrait. Another manufacturer imitated the trade mark. Held, that the portrait was a distinctive device; that as it was obviously the defendant’s intention to pass off his goods as made by the plaintiff, the plaintiff was entitled to an injunction, notwithstanding a delay in claiming his right.—*Rowland v. Mitchell*, 75 L.T. 65.
- (v.) **C. D.**—*Registration by Agent of Trade Mark of Foreign Producer—Patents, Designs and Trade Marks Act, 1883, s. 90.*—An English company were agents, but not sole agents, for goods supplied by an American firm and registered in the United States. The English company registered the trade mark in this country a few weeks before the American firm sold its business to another firm. Held, that such registration was without sufficient cause, and rectification was ordered.—*In re European Blair Camera Company’s Trade Mark*, 75 L.T. 63.
- (vi.) **C. D.**—*Registration—Change of Name of Proprietor—Patents, Designs and Trade Marks Acts, 1883, ss. 78, 87, 90, 92; 1888, ss. 21, 23.*—Where the registered proprietors of a trade mark changed their name, it was held that the new name should be inserted in the register under sect. 87 of the Act of 1883.—*In re New Ormonde Cycle Co., Limited*, L.R. [1896] 2 Ch. 520; 75 L.T. 50.

- (i.) **C. A.**—*Bovril*—*Fancy Word not in Common Use*—*Patents, Designs and Trade Marks Act, 1888, ss. 64, 90.*—"Bovril" was held to have been properly registered in 1886 as a "fancy word not in common use" within sect. 64 of the Act of 1883.—*In re Trade Mark "Bovril,"* 74 L.T. 805.
- (ii.) **C. A.**—*Foreign Words or Oriental Characters*—*Trade made Limited to Goods Exported.*—Foreign words or oriental characters, merely descriptive of a device already registered, cannot be registered as part of the existing trade mark. Nor can a trade mark be registered with a limitation of its use to fabrics exported to a particular foreign country.—*The Trade Mark Application of John Dewhurst & Sons, Limited,* L.R. [1896] 2 Ch. 137; 74 L.T. 388.
- (iii.) **C. A.**—*Right to Name apart from Registration as Trade Mark.*—Decision of Ch. D. (see Vol. 20, p. 58, iii.) affirmed. (See also Vol. 19, p. 27, i., and p. 106, iv.)—*Powell v. Birmingham Vinegar Brewery Co.,* L.R. [1896] 2 Ch. 54; 74 L.T. 509.
- (iv.) **C. D.**—*Registration—Representation of a Crown.*—There is no binding rule prohibiting the registration of a trade mark which contains the representation of a crown.—*In re König and Ebhardt's Application,* L.R. [1896] 2 Ch. 236.

### Trades Union:—

- (v.) **C. A.**—*Strike—Picketing.*—Picketing except "to obtain or communicate information" will be restrained by interlocutory injunction.—*Lyons & Sons v. Wilkins,* L.R. [1896] 1 Ch. 811; 74 L.T. 358.

### Trespass:—

- (vi.) **Ch. D. & C. A.**—*Tipping Spoil on to Neighbouring Land—Measure of Damages.*—Where defendants had been restrained by injunction from tipping spoil on to plaintiff's land, it was held, on the principle applied to wayleaves, that the measure of damages for the trespass committed previous to the injunction was to be based on the value for tipping of so much of the land as had been used for that purpose by the defendants, and on the diminished value to the plaintiffs of the remainder of the land.—*Whitcomb v. Westminster Brymbo Coal and Coke Co., Limited,* L.R. [1896] 1 Ch. 894; 74 L.T. 405 and 804.

### Trust:—

- (vii.) **C. A.**—*Breach—Following Trust Funds.*—Where a father had appropriated trust funds to which his son was ultimately entitled, it was held, affirming the decision of the Court below, that as there was no evidence of arrangement between the parties or of presumption of satisfaction, the son's interest under the trust was not diminished by the father having settled upon him funds in excess of that interest; notwithstanding (in this respect reversing the decision of the Court below) that part of the sums so settled had been derived from the trust fund appropriated.—*Chrichton v. Chrichton,* L.R. • [1896] 1 Ch. 870; 74 L.T. 357. (*Vide* 50 (vii.) *ante*.)

### Trustee:—

- (viii.) **C. A.**—*Liability—Breach of Trust—Lapse of Six Years—Account—Statute of Limitations—Trustee Act, 1888.*—Decision of Chancery Court (see Vol. 21, p. 85, iii.) affirmed.—*How v. Earl Winterton,* 75 L.T. 40.

**C. D.—Investment—Company Incorporated by Act of Parliament.**—Power to trustees to invest in "bonds, debentures, or debenture stock of any company incorporated by Act of Parliament" does not authorise investment on similar securities in a company registered under the Companies Act.—*In re Smith; Davidson v. Myrtle*, L.R. [1896] 2 Ch. 590; 74 L.T. 810.

- (ii.) **C. D.—Negligence—Loss—Liability of Sleeping Trustee.—Trustee Act, 1888, s. 8, sub-s. 1—Statute of Limitations.**—Money for investment under a marriage settlement was handed to trustee A., who, without further steps, handed it to his fellow trustee B., who confided it to an outside broker, with the result that the greater part was lost. *Held*, that B. was liable to make good the loss; that both trustees were liable to the *cestuis que trust* following *Speight v. Gaunt*; that as A. and B. were in *pari delicto*, B., on making good the loss, would have right of contribution from A., following *Chillingworth v. Chambers* (Vol. 21, p. 51, i., and p. 85, iv.), and that Statute of Limitations furnished no defence.—*Robinson v. Harkin*, L.R. [1896] 2 Ch. 415; 74 L.T. 777.
- (iii.) **Ch. D.—Trustee Act, 1893, ss. 31, 32, 50—Infant Tenant-in-tail—Vesting Order.**—The estate tail and remainders over are barred by the issue of an order under the Trustee Act, 1893, appointing a person to convey the estate of an infant tenant-in-possession.—*Faber v. Montagu*, L.R. 1 Ch. 549; 74 L.T. 346.
- (iv.) **C. D.—Absconding Trustee—Vesting Order—Trustee Act, 1893, ss. 26 & 35; Lunacy Act, 1890, ss. 135 & 136.**—Where one of the trustees under a marriage settlement absconded, the Court made an order vesting the property in the remaining trustees.—*In re Lees Settlement*, L.R. [1896] 2 Ch. 508; 75 L.T. 178.

### Vendor and Purchaser:—

- (v.) **C. D.—Misdescription of Lease for Underlease.**—Under a contract of sale a vendor described the property as held under a lease with which the title was to commence. The so-called lease contained covenants relating to the lessor and his superior landlord. *Held*, that the misdescription was fatal and that therefore a good title had not been shewn.—*Broom v. Phillips*, 74 L.T. 459.
- (vi.) **C. A.—Title Deeds—"Information not in the Vendor's Possession"—Conveyancing Act, 1881, s. 3, sub-s. 6.**—The expense of ascertaining the whereabouts of title deeds which are out of the vendor's possession falls upon the purchaser, under sect. 3, sub-sect. 6, of the Conveyancing Act, 1881, unless there is a stipulation to the contrary.—*In re Stuart and Olivant and Seadon's Contract*, L.R. [1896] 2 Ch. 328; 74 L.T. 450.
- (vii.) **C. D.—Will—Residue Charged with Legacies—Power to Trustees to Sell—Concurrence of Residuary Devisees.**—A testator after pecuniary and specific bequests left part of the residue of his real and personal estate to trustees upon trusts and part to certain persons equally share and share alike, with power to the trustees to sell any of the realty and hold the proceeds upon the trusts. The personal estate was not sufficient to meet the debts on the legacies. *Held*, that the trustees could make a valid assurance of freehold to purchaser without the concurrence of the residuary devisees.—*In re Dyson and Fowke's Contract*, 74 L.T. 759.
- (viii.) **Ch. D.—Auction—Non-disclosure of Covenants—Constructive Notice.**—A purchaser of leaseholds at auction, when neither the contract nor the printed conditions of sale gave notice of onerous covenants, and who was unaware that he could have inspected the lease, was held

entitled to a rescission of the contract.—*In re White and Smith's Contracts and the Vendor and Purchaser Act*, 1874, L.R. [1896] 1 Ch. 687; 74 L.T. 377.

- (i.) **C. D.**—*Deed of Assignment—Bankruptcy—Conveyance—Doubtful Title*—13 *Eliz.*, c. 5.—Under a deed of assignment a trustee for creditors entered into possession of freehold property. Shortly after the debtor was adjudicated a bankrupt, and subsequently the creditors' trustee sold the freehold by auction. *Held*, that the purchaser was right in refusing to accept the title without the concurrence of the trustee in bankruptcy.—*In re Poppleton and Jones's Contract and the Vendor and Purchaser Act*, 1874, 74 L.T. 582.
- (ii.) **C. D.**—*Married Woman—Trustee—Conveyance—Concurrence of Husband—Married Women's Property Act*, 1882, ss. 1, 18, 24.—The Act does not empower a married woman to convey without the concurrence of her husband property of which she is a trustee.—*In re Harkness and Allsopp's Contract*, L.R. [1896] 2 Ch. 358; 74 L.T. 652.

### Volunteer Corps:—

- (iii.) **Q. B. D.**—*Rules as to Non-Efficients—Volunteer Act*, 1863, s. 24.—It is *ultra vires* for a volunteer corps to make a rule that any member of the corps who should fail to make himself efficient and earn the capitation grant, shall pay to the corps a sum equal to the capitation grant which he has failed to earn.—*Reg. v. Lewis and Moss*, L.R. [1896] 1 Q.B. 665; 74 L.T. 551.

### Will:—

- (iv.) **P. D.**—*Construction*.—A bequest of "shares" in a company was held to pass debenture stock which was the only holding of the testatrix in the company.—*In re Weeding; Armstrong v. Weeding*, L.R. [1896] 2 Ch. 364; 74 L.T. 651.
- (v.) **C. A.**—*Construction—Legal Disability*.—Decision of Ch. D. (see Vol. 21, p. 85, vii.) affirmed.—*In re Carew; Carew v. Carew*, L.R. [1896] 2 Ch. 811; 74 L.T. 501.
- (vi.) **Ch. D.**—*Construction—Bequest of "All my Money"—Contingent Interests—Bequest of Specific Sum invested in B. Company—Shares at Premium*.—A testatrix who, amongst other property, possessed 500 shares (nominally of £1 each, but worth more) in a dairy company and was entitled in reversion to certain railway stock, bequeathed, in the terms of her will, "all my money except the sum of £400 invested in the Belgravian dairy company" in trust for certain persons. "The interest of the money in the Belgravian dairy company" she gave to three other persons for life "in equal sums"; and added "on their deaths I will that the whole sum invested as above be used for the purpose" specified. One of the life beneficiaries predeceased the testatrix. *Held*, that 400 shares represented the capital sum of which the three beneficiaries were to have the interest for life; that "on their deaths" meant on the death of the survivor; that the share of the one who died in the life of the testatrix was payable to the surviving beneficiaries in equal parts for their joint lives; that the survivor would take the whole interest on the 400 shares for life; and that "all my money" was the residue of the testatrix's personal property, whether in possession or reversion.—*In re Buller; Buller v. Giberne*, 74 L.T. 407.
- (vii.) **C. A.**—*Bequest of Furniture to A.—Power to B. to take all he might desire from same Furniture—Equitable Charge within Locke King's Act Amendment Act*, 1877, s. 1.—A testator gave to one person by will all the furniture in a house except such as should be otherwise disposed

of; and by codicil he gave to another person everything this person might desire from the said furniture, except certain articles. *Held*, that the person named in the codicil could take all the furniture, other than the excepted articles. Where land is made security for a debt by any instrument which gives to the person entitled to the charge an equitable interest in the land, such instrument creates an equitable charge within the meaning of Locke King's Amendment Act, 1877.—*In re Sharland; Kemp v. Rozey* (No. 2), 74 L.T. 664.

- (i.) **C. D.**—*Covenant to Pay Sum Certain—Payable at Certain Time—Interest*—3 & 4 Wm. IV., c. 42, s. 28.—Where a testator, covenanted to pay a fixed sum of money within six months after his death, it was *held* that interest at 5 per cent. was payable from the end of the six months till the money was paid.—*In re Horner; Fooks v. Horner*, L.R. [1896] 2 Ch. 188; 74 L.T. 686.
- (ii.) **C. D.**—*Tenant for Life and Remainderman—Reversion—Discretionary Power of Sale—Construction*.—A testator left property, part of which consisted of a reversion expectant on the death of his mother, upon trust for his mother for life with remainder to others, with a discretionary power of sale on the trustees, which was not exercised. *Held*, that the personal representative of the mother was not entitled to any share or proceeds of the sale of the reversion.—*In re Pitcairn; Brandreth v. Colvin*, L.R. [1896] 2 Ch. 199.
- (iii.) **C. D.**—*Construction—Absolute Gift—Direction to Pay Part of Proceeds of Sale—Repugnant and Void*.—A testator left tea plantations in Assam and all his other property to the plaintiff, whom he appointed sole executrix, subject to the payment of his debts; but on any sale of the tea plantations he directed her to pay out of the proceeds certain sums to other persons. *Held*, that there was no obligation imposed upon the plaintiff to sell, and that the direction to pay to other persons part of the optional sale was repugnant and void.—*In re Elliot; Kelly v. Elliot*, L.R. [1896] 2 Ch. 353; 75 L.T. 138.









